

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 570

McELROY, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS,

vs.

UNITED STATES, EX REL. DOMINIC GUAGLIARDO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

INDEX

Original Print

Record from the United States District Court for the District
of Columbia.

Petition for writ of habeas corpus	1	1
Order directing respondents to show cause	5	4
Excerpts from return and answer to rule to show cause...	10	5
Affidavit of William M. Burch, II	22	7
Affidavit of Robert W. Van Werne	28	11
Charge sheets	29	13
Excerpts from traverse of return and answer to rule to show cause	33	17
Supplemental memorandum of respondents	46	19
Opinion, Holtzoff, J.	47	20
Notice of appeal	70	33
Proceedings in the United States Court of Appeals for the District of Columbia Circuit	71	33
Opinion, Fahy, J.	71	34
Dissenting opinion, Burger, J.	81	42
Judgment	97	55
Order of Burger, J., supplementing dissenting opinion.....	98	56
Clerk's certificate (omitted in printing)	100	57
Order allowing certiorari	101	57

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

UNITED STATES OF AMERICA EX REL DOMINIC GUAGLIARDO,
Base Stockade, Nouasseur Air Depot, Morocco,
Petitioner,

v.

NEIL H. McELROY, SECRETARY OF DEFENSE, Department of
Defense, Washington, D. C.

JAMES H. DOUGLAS, SECRETARY OF THE AIR FORCE,
Department of Defense, Washington, D. C.

GEN. THOMAS D. WHITE, CHIEF OF STAFF, UNITED STATES
AIR FORCE, Department of Defense, Washington, D. C.
Respondents.

Petition for Writ of Habeas Corpus—Filed December 2, 1957

The petition of Dominic Guagliardo respectfully shows:

1. That the petitioner, Dominic Guagliardo, is a citizen of the United States. That, at all times relevant hereto, he was a civilian employed by the United States Air Force at the Nouasseur Air Depot, near Casablanca, Morocco. That he is not a member of the Armed Forces of the United States.

2. That petitioner is currently held, pursuant to Military Orders and by direction of military authorities, in the territorial limits of Morocco and within the jurisdiction of the 17th United States Air Force.

2 3. That heretofore, purporting to act under the authority of Article 2 (11) of the Uniform Code of Military Justice (50 U.S.C. § 522 (11)), the United States Air Force caused petitioner to be tried by a general court martial of the United States Air Force convened at Nouasseur Air Depot, Morocco, on charges of larceny and

conspiracy in violation of Articles 121 and 81 of the Uniform Code of Military Justice (50 U.S.C. §§ 715 and 675).

4. That petitioner was so tried and on or about September 3, 1957, was sentenced to three (3) years at hard labor and a fine of \$1,000.00.

5. That since on or about September 3, 1957, petitioner has been and is now detained and confined at the Base Stockade, Nouasseur Air Depot, Morocco.

6. That petitioner's detention and confinement is illegal and in violation of the Constitution of the United States, to wit, Article III, Section 2, and the Sixth Amendment, which guarantee to petitioner, a civilian, the right to trial by jury after indictment by a grand jury, said guarantees having been most recently reiterated in *Reid v. Covert*, U.S. 1 L. Ed. 2d 1148 (1957).

7. That the persons exercising physical custody and restraint of petitioner are subordinate to and under the direction of respondents.

8. That the respondents herein are the highest ranking officials of the military establishment of the United States and the United States Air Force and by law and custom of the military service, have jurisdiction over and are empowered to issue orders to subordinates in command, including the military personnel who hold petitioner in confinement at the Nouasseur Air Depot, near Casablanca, Morocco.

9. No previous application has been made for the relief herein sought to any court or judge.

WHEREFORE, petitioner prays that a writ of habeas corpus be granted and issued, directed to respondents, commanding them to produce the body of petitioner before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of petitioner, and that petitioner be ordered discharged from the detention and restraint aforesaid; and for such

other and further relief as to the Court seems just and proper.

JACK BOHANA
Jack Bohana,
On Behalf of
DOMINIC GUAGLIARDO, *Petitioner.*

MICHAEL A. SCHUCHAT
Michael A. Schuchat,
231 Tower Building,
Washington, D. C.

Attorney for Petitioner.

GEIGER, HARMEL AND SCHUCHAT,

Of Counsel.

4 STATE OF NEW YORK } ss:
COUNTY OF NEW YORK }

Jack Bohana, being duly sworn, deposes and says:

That he is an attorney admitted to practice before the Court of Appeals of the State of New York; that he is engaged in the practice of law in Casablanca, Morocco; that he is the attorney for petitioner in the court martial proceedings described in the petition; that he has read the foregoing petition and has signed it at the request of and on behalf of petitioner; that he knows the contents of the petition and that, upon information and belief, all matters contained therein are true.

JACK BOHANA
Jack Bohana

Sworn to before me this 21 day of November, 1957.

REUBEN K. SMITH
Notary Public

Reuben K. Smith
Notary Public, State of New York
No. 31-3742500
Qualified in New York County
Commission Expires March 30, 1959

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5

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

H. C. No. 123-57

UNITED STATES OF AMERICA EX REL DOMINIC GUAGLIARDO,
Petitioner,

v.

NEIL H. McELROY, ET AL, *Respondents.*

Order Directing Respondents to Show Cause—December 2, 1957

Upon consideration of the verified petition of Dominic Guagliardo for a writ of habeas corpus filed herein, and good cause appearing therefor, it is this 2nd day of December, 1957,

ORDERED, That the respondents be and they are hereby ordered and directed to appear before the Judge of said Court sitting in Motions Court on the 17th day of December, 1957, at 10 o'clock A.M. of said day, to show cause, if any they have, why a writ of habeas corpus should not be issued and the relief granted as prayed for in the aforesaid petition; PROVIDED, that a copy of this rule and of said petition be promptly served upon the respondents herein.

JOHN J. SIRICA

United States District Judge

10

(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

H. C. No. 123-57

DOMINIC GU'AGLIARDO, *Petitioner*

v.

NEIL H. McELROY, ET AL, *Respondents*

**Excerpt From Return and Answer to Rule to
Show Cause—Filed December 12, 1957**

Come now the respondents, Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of Air Force and General Thomas D. White, Chief of Staff, United States Air Force, by their attorney, the United States Attorney in and for the District of Columbia, and as a return and answer to the rule to show cause respectfully represent to the Court as follows:

1. The petitioner, a civilian employee of the Department of the Air Force, hired on March 31, 1954, at Nouasseur Depot, Morocco, was tried and convicted on August 28-29 and September 3-4, 1957 by a General Court Martial convened by the Commander, Southern Materiel Area, Europe, on charges of having violated the Uniform Code of Military Justice Article 121, 10 U.S.C. 921, with one specification thereunder alleging that he did with two named airmen steal property of the United States of a value of about \$4690.00 and of having violated the Uniform Code of Military Justice Article 81, 10 U.S.C. 881, with one specification thereunder alleging that he did conspire with two named airmen to commit the crime of larceny. The petitioner was sentenced by the Court Martial to be fined \$1,000 and to be confined at hard labor for 3 years. He is presently in confinement in the Base Stockade, Nouasseur Air Depot, Morocco, in the custody of the Commander, 3153rd Air Base Wing, Nouasseur Air Base, Morocco.

Initial review action on the record of trial pursuant to Articles 61 and 64 of the Uniform Code of Military Justice, 10 U.S.C. 861 and 864 was completed on December 10, 1957, resulting in the disapproval of findings

of guilty as to Charge I and its specification (larceny), due solely to an instructional deficiency and not due to failure of proof. The sentence was approved. This review action was taken by the Commander, Southern Air Materiel Area, Europe.

* * * * *

21 WHEREFORE, the premises considered, the respondents respectfully request the Court to dismiss the petition for habeas corpus and discharge the rule to show cause.

OLIVER GASCH
Oliver Gasch
United States Attorney

EDWARD P. TROXELL
Edward P. Troxell, *Principal*
Asst. United States Attorney

JOHN W. KERN III
John W. Kern III
Asst. United States Attorney

Certificate of Service

I hereby certify that a copy of the foregoing Return and Answer has been delivered by hand to Messrs. Geiger, Harmel and Schuchat, Tower Building, Washington, D. C., attorneys for the plaintiff, this 12th day of December, 1957.

JOHN W. KERN III
John W. Kern, III
Asst. United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

DOMINIC GUAGLIARDO, *Petitioner*

v.

NEIL H. McELROY, ET AL, *Respondents*

Affidavit

DISTRICT OF COLUMBIA: SS

I William M. Burch II, being first sworn upon oath depose and say:

I am a Major in the office of the Judge Advocate General, United States Air Force, and as such I have access to the records of the Department of the Air Force pertaining to the General Court Martial case of United States vs. Dominic Guagliardo, the petitioner herein.

I certify that the following information concerning the general court-martial case of Dominic Guagliardo is contained in official records of the Department of the Air Force and is true to the best of my knowledge and belief:

Guagliardo was hired by the Department of the Air Force on 31 March 1954 at Nouasseur Air Depot, Morocco, by the Civilian Personnel Office at that installation. His position title was that of an electrical lineman and his duties consisted of maintaining and repairing air field lighting, inspecting and repairing electrical conduits, transformers, lights, controls, ducts, and manholes. His Civil Service grade was that of a WB-15. On 31 March 1957 Guagliardo's temporary Civil Service appointment was converted to a career appointment pursuant to Civil Service Regulation 3.107. According to evidence adduced at the court-martial and as indicated in his petition for a writ of habeas corpus, Guagliardo remained in his status of a Dep't. of the Air Force Civilian employee throughout the entire proceedings. Additional information relating to the petitioner's employment status is contained in attached Exhibit A, being the affidavit of Captain Robert W. Von Werne.

On 18 July 1957, Guagliardo, together with two members of the United States Air Force, were charged with a violation of the Uniform Code of Military Justice, Article 121 (10 USC 921), with one specification thereunder alleging that the three accused, acting jointly and in pursuance of a common intent, did at Nouasseur Air Depot, Morocco, on or about 20 June 1957, steal leatherette goods and olive drab fabric material, of a total value of about \$4690.00 the property of the United States. In addition, the three accused were also charged with a violation of the Uniform Code of Military Justice, Article 81 (10 USC 881), with one specification thereunder alleging that they did conspire with each other to commit an offense under the Uniform Code of Military Justice, to wit: larceny.

On 14 August 1957, the charges against Guagliardo and his co-accused were referred to trial by a general court-martial appointed by paragraph 1, Special Order Number 144, dated 10 July 1957, as amended by paragraph 7, Special Order Number 161, dated 1 August 1957, as amended by paragraph 3, Special Order Number 140, dated 16 July 1957, all of the foregoing orders having been published by Headquarters, Southern Air Materiel Area, Europe (AMC), APO 30, New York, New York. (A photostatic copy of the charge sheet in this case is attached as Exhibit B.)

On 28-29 August 1957 and 3-4 September 1957, Guagliardo and his co-accused were tried by general court-martial convened at Nouasseur Air Depot, Morocco. Guagliardo pleaded not guilty to the charges and specifications and was found guilty, except that the value of the goods stolen was found to be "more than \$50.00" rather than "about \$4690.00".

24 Guagliardo was sentenced by the court to be fined \$1000.00 and to be confined at hard labor for three years.

Guagliardo is presently a prisoner at the Base Stockade at Nouasseur Air Base, Morocco. The person who has custody over the prisoner is the Commander, 3153rd Air Base Wing, Nouasseur Air Base, Morocco.

On December 10, 1957, the Commander Southern Air Materiel Area, Europe, disapproved the findings of guilty of charge I and its specification (larceny) because of an

instructional deficiency and approved the sentence as adjudged by the court.

Pursuant to the provisions of the Uniform Code of Military Justice (10 USC 801-940) the following appellate review process is applicable to this case. Prior to taking his action, the convening authority submitted the record for a written opinion to his staff judge advocate, who is a member of the bar of a Federal Court or of the highest court of a state and designated as competent to perform judge advocate duties by The Judge Advocate General. The opinion of a staff judge advocate includes a summary of all the evidence presented, an analysis of the legal problems involved, the application of the law to those problems, and an opinion as to whether the record was legally sufficient to support the finding of guilty and sentence in their entirety or in part. This review was made pursuant to Uniform Code of Military Justice, Article 61 (10 USC 861).

The staff judge advocate was also required to make a written report of those facts which should be considered by the officer exercising general court-martial jurisdiction, and other higher authorities charged with action on the case, in deciding whether clemency should be granted and the extent thereof. This report normally consists of the results of a personal interview with the accused; a history of his military service and available civilian background; and the recommendations of his chaplain, his squadron commander and others having a personal knowledge
 25 of his character, efficiency, and potential value to the Air Force.

After the officer exercising general court-martial jurisdiction received the opinion and recommendation of his staff judge advocate, he on the basis thereof and his independent consideration of the case, took the action he believed to be legal and appropriate pursuant to Uniform Code of Military Justice, Article 64 (10 USC 864). He had the power to approve only those findings of guilty and the sentence, or such part thereof, as he found correct in law and fact, and as he determined should be approved.

The record of trial will now be forwarded to the Office of The Judge Advocate General for review by a Board of Review in that office pursuant to Uniform Code of Military Justice, Article 65b (10 USC 865b).

The Board of Review is composed of three attorneys-at-law, who have been selected for the assignment on the basis of their training, experience, and ability in the field of law. Pursuant to Uniform Code of Military Justice, Article 66, (10 USC 866) the Board will determine not only whether the record is legally sufficient to support the findings and sentence, but whether the sentence is appropriate under all the circumstances. The Board will set aside all or such part of the findings and sentence as are not supported in law and fact.

If the Board affirms any part of the findings and sentence, the record will be forwarded to The Judge Advocate General, United States Air Force, for his independent consideration. If he concurs in the decision of the Board he will then determine whether the exercise of his clemency powers; with respect to the sentence is justified under the provisions of Uniform Code of Military Justice, Article 74 (10 USC 874). In making this determination, The Judge Advocate General considers the post-trial report of the military and civilian background of the accused made by the staff judge advocate to the officer exercising general court-martial jurisdiction; the seriousness of the offense; the circumstances surrounding the commission thereof, including aggravating as well as mitigating and extenuating circumstances; the sentence usually approved in cases of this nature; letters submitted in the accused's behalf; and other factors that may be pertinent.

If the Judge Advocate General concurs in the decision of the Board, a copy of that decision and his concurrence therein will be forwarded to the officer exercising general court-martial jurisdiction over the accused for service upon him. When the accused is served with the decision, he will be advised that he has thirty days within which to petition the United States Court of Military Appeals pursuant to the provisions of Uniform Code of Military Justice, Article 67 (10 USC 867) for a grant of review on any error of law he believes to exist in the case. The Court of Military Appeals consists of three judges appointed from civilian life by The President, with the advice and consent of the United States Senate.

If the Court of Military Appeals denies the accused's petition, the officer exercising general court-martial jurisdiction over the accused will be authorized to order into

execution such part of the sentence, as affirmed by the Board of Review and concurred in by The Judge Advocate General, as that officer considers necessary in the interests of justice and discipline. In addition to the foregoing appellate review available to the Petitioner in this case, pursuant to Article 73 of the Code (10 USC 873) Petitioner also has the right at any time within one year after approval by the Convening Authority of any sentence extending to confinement for one year or more to petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court.

The records of the Department of the Air Force reflect that Petitioner, Guagliardo has not availed himself of all of the post-trial review procedures hereinbefore outlined and which are available to him in that only the initial review action by The Convening Authority has been completed in this case.

WILLIAM M. BURCH, II
William M. Burch, II

Subscribed and sworn before me this 12th day of December, 1957

MILDRED N. WALL
*Notary Public in and for
the District of Columbia*

My commission expires Aug. 15, 1962

28

(Filed Dec. 12, 1957)

EXHIBIT A

AFFIDAVIT

24 October 1957

I certify that the following information concerning Dominic Guagliardo, DAFC, to be true, to the best of my knowledge and belief:

(1) Date and place hired: 31 March 1954, at Nouasseur Air Depot, Morocco (Civilian Personnel Office).

(2) Wage Board Classification and duties performed: WB-15; Electrical Lineman (Maintains and repairs airfield

lighting, inspects and repairs electrical conducts, transformers, lights, controls, ducts and manholes).

(3) Date of Arrival in Morocco and type of transportation used: February 1954, by commercial ocean vessel.

(4) Type of passport and visa required: US Passport #16246, no visa required.

(5) Type and location of quarters: Quarters were not furnished on base. Accused's last address was: 29 Rue de Terves, Apt 35, Casablanca, Morocco.

(6) Accused was accompanied by wife on arrival in Morocco. Transportation was not at Government expense. However, accused's dependents departed Morocco for the Zone of Interior at government expense in September 1957.

(7) Privileges available to accused in Morocco were: Quarters allowance, commissary, USAFE Ration Card, Base Exchange, Officer's Club membership, medical and dental care at base hospital, authorization to use Military Payment Certificates and US Mail Privileges.

(8) Medical and Dental Treatment: Five (5) visits to base hospital in 1955 and 1956 for treatment of injured right hand; two (2) physical examinations in 1957. No record of dental treatment at this base.

(9) Photostatic copies of charge sheets are attached.

(10) Citizenship: Accused is US Citizen by birth; born at Tampa, Florida 6 July 1932.

ROBERT W. VON WERNE
Robert W. Von Werne
Captain, USAF
Commander, HEDRONSEC
3153rd Air Base Wing
APO 30, USAF

The above named officer, Captain Robert W. Von Werne, personally appeared before me and affixed his signature thereto.

JAMES W. WEBER
James W. Weber
1st Lt, USAF
Adjutant

CHARGE SHEET

PLACE Mossman Air Depot, Morocco		DATE 18 JUL 1957
ACCUSED (Last name, First name, Middle Initial) (List aliases when material.) GUNLIARDO, DOMINIC	SERVICE NUMBER ASO 8E292028 (Civ)	RANK OR GRADE RAF Civilian WD 15
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) Headquarters Squadron Section 3153rd Air Base Wing United States Air Force APO 30, USAF	DATE OF BIRTH 6 July 1932 CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 12b (2)) N/A	PAY PER MONTH BASIC \$ 506.88 SEA OR FOREIGN DUTY \$ None TOTAL \$ 506.88

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE 31 Mar 54	TERM OF CURRENT SERVICE Indef
PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.) Military Service, USAF, from 5 Apr 51 to 21 Oct 53, Honorable Discharge. No prior Federal Civilian Service.	

CHARGE SHEET

PLACE Mossman Air Depot, Morocco		DATE 18 JUL 1957
ACCUSED (Last name, First name, Middle Initial) (List aliases when material.) HALL, Ralph C.	SERVICE NUMBER AF 25 989 260	GRADE Airman Basic
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) Headquarters Squadron Section 3153rd Air Base Wing United States Air Force APO 30, USAF	DATE OF BIRTH 8 Dec 36 CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 12b (3)) None	PAY PER MONTH BASIC \$ 98.00 SEA OR FOREIGN DUTY \$ 8.00 TOTAL \$ 106.00

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE 5 Nov 54	TERM OF CURRENT SERVICE 12 Nov 58
PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination, if available.) None	

CHARGE SHEET

PLACE Mouassour Air Depot, Morocco	DATE 18 JUL 1957
ACCUSED (Last name, First name, Middle Initial) (List aliases when material.) Donaldson, Howard B. Jr.	SERVICE NUMBER AF 1-41 597
ORGANIZATION AND ARMED FORCE (If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.) Headquarters Squadron 3153rd Air Base Wing United States Air Force APO 30, USAF	RANK OR GRADE Airman Second Class PAY PER MONTH BASIC \$ 132.60 SEA OR FOREIGN DUTY \$ 0.50 TOTAL \$ 133.10
DATE OF BIRTH 13 May 1935	CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE (MCM, 136 & (2)) \$0.00

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE
12 JULY 1955TERM OF CURRENT SERVICE
Six (6) years

PRIOR SERVICE (As to each prior period of service, give inclusive dates of service and organization in which serving at termination.)

28 May 1952 to 11 July 1955. Serving with 7270th Installations Squadron, APO 30, USAF at time of last discharge.

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR	
		PROSECUTION	ACCUSED
A/2C Michael Hofer	3153rd Air Base Wing	X	
Major Charles L. Norden	3153rd Air Police Squadron	X	
S/Sgt Robert E. Clark	3153rd Air Police Squadron	X	
Major William S. Donaldson	3153rd Air Police Squadron	X	
1/Lt. Lloyd D. G. G.	3153rd Air Police Squadron	X	
W/Sgt Nelson L. Evans	3153rd Support Squadron	X	
W/Sgt C. D. Briggs	3153rd Air Police Squadron	X	

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND

- 1,332 yards of Lent's Rotte Goods and 1,713 yards of fabric material, stolen Government Property, returned to Morocco, Mouassour Air Depot, Morocco.
- Air Police Report of investigation Case Number 27107, Mouassour Air Depot, Morocco, dated 11 July 1957: Attached.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED

DATE

LOCATION

Confined Base Stockade

23 to 24 June 1957

Mouassour Air Depot, Morocco

Confined Base Stockade

16 July 1957

Mouassour Air Depot, Morocco

(released)

Charge I : Violation of the Uniform Code of Military Justice, Article 121

Specification In that Airman Second Class Howard B. Donaldson Jr., Air Basic Ralph C. Hall, United States Air Force, Headquarters Squadron 3153rd Air Base Wing, APO 30, USAF, and Dominic Gagliardo, Department of Air Force Civilian, 3153rd Air Base Wing, APO 30, USAF, acting jointly, and in pursuance of common intent, did, at Nouasseur Air Depot, Morocco, on or about 20 June 1957, steal leatherette goods and olive drab fabric material, of a total value of about \$4,690.00, the property of the United States.

Charge II: Violation of the Uniform Code of Military Justice, Article 81

Specification In that Airman Second Class Howard B. Donaldson Jr., Airman Basic Ralph C. Hall, United States Air Force, Headquarters Squadron, 3153rd Air Base Wing, APO 30, USAF, and Dominic Gagliardo, Department of Air Force Civilian, 3153rd Air Base Wing, APO 30, USAF, did, at Nouasseur Air Depot, Morocco, on or about 20 June 1957, conspire with each other to commit an offense under the Uniform Code of Military Justice, to wit: larceny of leatherette goods and olive drab fabric material, of a value of about \$4,690.00, the property of the United States, and in order to effect the object of the conspiracy, the said Airman Second Class Howard B. Donaldson Jr., did contact Airman Second Class Michael Hofer to procure a United States government truck to haul said property off the limits of Nouasseur Air Depot, Morocco.

ROBERT V. VON WENGE

CAPTAIN

MEMPHIS, 3153rd Air Base Wing

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accused this 18TH day of JULY, 19 57 and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

Robert V. Wenge
SIGNATURE

1st Lt, 3153rd Air Base Wing, APO 30,
NAME AND ORGANIZATION OF OFFICER
ADMINISTERING OATH **USAF**

Assistant Adjutant
OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC.
SEE PARAGRAPH 24, MCN, 1951, AND ARTICLES 24 AND 13A

Officer administering oath must be a commissioned officer.

18 JUL 1957
DATE

I have this date informed the accused of the charges against him.

Robert V. Wenge
SIGNATURE

Captain, 3153rd Air Base Wing, APO 30,
NAME AND ORGANIZATION **USAF**

Headquarters, 3153rd Air Base Wing
DESIGNATION OF COMMAND OR OFFICER EXERCISING
SUMMARY COURT-MARTIAL JURISDICTION

MEMPHIS, TENN
PLACE
18 July 1957
DATE

The sworn charges above were received at **1900** hours this date.
FOR THE COMMANDER:
Robert E. Thompson
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SHOWING
1ST INDORSEMENT

Hq. Southern Air Materiel Area Group, Henslow Air Base, Henslow, 14 Aug 57

Referred for trial to the court-martial appointed by **Para 1, Special Order Number 141,**
Oct 20 July 1957 as amended by Para 7, Special Order Number 141, and 1 Aug 57 as
amended by Para 2, Special Order Number 141, and 14 Aug 57, Hq. Southern Air Materiel Area Group (AMAG), APO 30, New York, N.Y.
To be tried in a joint trial with A-1

BY: **THE CHAIRMAN**
John H. Bodan
SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SHOWING

I have served a copy hereto on each of the above-named accused, this 26TH day of August, 19 57

Jay P. Couge
SIGNATURE

1st LT, Hq SAMA(E)
NAME AND ORGANIZATION OF TRIAL COUNSEL

1) When an appropriate commander does personally, inapplicable words are stricken out. 2) Relative to proper instructions which may be included in the instrument of reference for trial, see par. 13(1), MCN, 1951. 3) None, so state.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted)

**Excerpts From Traverse of Return and Answer to Rule to
Show Cause—Filed December 16, 1957**

1. The Return and Answer of respondents admits that petitioner, a civilian, is being detained by virtue of a sentence of conviction of a General Court Martial held under the purported authority of Article 2(11) of the Uniform Code of Military Justice, 50 U.S.C. Sec. 552(11). Respondents thus place in issue the basic question of the constitutionality of Article 2(11) as applied to this petitioner in the particular circumstances of this case.

The undisputed facts may be summarized thus:

In February 1954, petitioner, an American citizen, accompanied by his wife, went to Morocco. He went at his own expense via private commercial transportation with an ordinary passport. Subsequently, on March 31, 1954, he was hired by the Civilian Personnel Office, Nouasseur Air Depot (near Casablanca, Morocco) as an Electrical Lineman. His duties are said to be: "Maintains and repairs airfield lighting, inspects and repairs electrical conducts, transformers, lights, controls, ducts and manholes." Petitioner has no clearance for security or classified information and has no special technical skill or occupation that cannot be provided from within the Armed Forces.

34 During all of the times here involved, petitioner resided, with his wife and child, in Casablanca, Morocco, in a private apartment house.

As part of his compensation, he received an allowance for his living quarters and was permitted to purchase at the Commissary and Base Exchange, for which he was issued a ration card. Medical and dental care were available to him but appear to have been used only in treatment of an injury to his right hand and for two physical examinations. Whether these visits were in connection with injuries received during his employment is not known.

In June of this year, petitioner was accused of violating Articles 121 and 81 of the Uniform Code of Military

Justice, felonies for which he might be liable to 10 years imprisonment and a fine of apparently unlimited amount. He was arrested and detained in the Base Stockade, Nouasseur Air Depot, and subsequently tried by a General Court Martial, whose jurisdiction he challenged on the constitutional grounds here asserted. The Court Martial found him guilty and sentenced him to three years at hard labor and a fine of \$1,000.00. The Court Martial proceedings were on December 10, 1957 (after the filing of this Petition) reviewed and the conviction under Article 121 was disapproved but the sentence remained unchanged.

.

43 6. Respondents contend the "*practical necessity*" requires court-martial jurisdiction over civilian employees in peacetime. Petitioner denies that the practical necessities can override the specific constitutional guarantees. In *McCune v. Kilpatrick*, 53 F. Supp. 80 (D.E.D. Va. 1943), the Court said:

"The civil courts may not surrender a civilian to the jurisdiction of the military for expediency, convenience or even necessity, for to do so would destroy those constitutional rights and privileges guaranteed to citizens of this country."

If practical necessity is to govern the decision in the case at bar, then it is petitioner's position that practical necessity does *not* require court martial jurisdiction in this case. Petitioner disputes the factual assertion by respondents. If the Court deems this matter material, a hearing should be held to adduce testimony as to the scope and dimensions of the problem and the alternative solutions available.

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Respectfully submitted,

MICHAEL A. SCHUCHAT
Michael A. Schuchat,
Attorney for Petitioner.

GEIGER, HARMEL AND SCHUCHAT,
Of Counsel.

Certificate of Service (omitted in printing)

(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted)

Supplemental Memorandum—Filed January 10, 1958

Come now the respondents, Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of Air Force and General Thomas D. White, Chief of Staff, United States Air Force, by their attorney, the United States Attorney in and for the District of Columbia; and respectfully represent to the Court as follows:

1. On January 7, 1958, the petitioner was transferred to Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, and he is presently in confinement at that installation.

OLIVER GASCH

Oliver Gasch

United States Attorney

EDWARD P. TROXELL

Edward P. Troxell, *Principal*

Assistant United States Attorney

JOHN W. KERN III

John W. Kern III

Assistant United States Attorney

Certificate of Service (omitted in printing)

(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123-57

UNITED STATES OF AMERICA EX REL DOMINIC GUAGLIARDO,
Petitioner,

v.

NEIL H. McELROY, Secretary of Defense, et al.,
Respondents.

Opinion—January 13, 1958

Irwin Geiger, Esq., and Michael A. Schuchat, Esq., both of Washington, D. C., for the petitioner.

Oliver Gasch, Esq., United States Attorney; Edward F. Troxell, Esq., Principal Assistant United States Attorney; and John W. Kern III, Esq., Assistant United States Attorney, all of Washington, D. C., for the respondents.

The question presented in this *habeas corpus* proceeding, is whether a civilian employee attached to the armed forces of the United States stationed in a foreign country, is subject to trial by court-martial for an offense connected with his activities.

The issue arises on a return to an order to show cause granted in response to a petition for a writ of *habeas corpus* filed by a prisoner confined at an Air Depot in Morocco, against the Secretary of Defense, the Secretary of the Air Force, and the Chief of Staff of the United States Air Force. The petitioner, Dominic Guagliardo, was
48 employed by the Department of the Air Force as an electrical lineman at Nouasseur Air Depot, Morocco. On July 18, 1957, he was charged with larceny of Government property consisting of leatherette goods and olive drab fabric material, valued at about \$4690. In

addition, he and two other persons were charged with conspiracy to commit larceny. He was tried and convicted by a general court-martial convened at the Air Depot and was sentenced to confinement at hard labor for three years and a fine of \$1,000. The convening authority disapproved the finding of guilty on the first of the two charges, but approved the sentence as to the second charge. The petitioner is now a prisoner at the Base Stockade, at the above mentioned Air Depot in Morocco. The matter still remains to be considered by the Board of Review of the Office of the Judge Advocate General, as well as by the Judge Advocate General. If after going through these channels the sentence is approved, the petitioner will still have the right to petition the United States Court of Military Appeals for a review of any alleged error of law.

The petitioner has applied to this court for a writ of *habeas corpus* on the ground that he has been deprived of his constitutional rights to indictment by a grand jury and trial by jury. The respondents filed a return and answer setting forth the prior proceedings in detail and asserting that civilian employees who accompany or serve with the armed forces of the United States in the field, are subject to trial by court-martial. A traverse to the return has been filed by counsel for the petitioner. The matter was heard on the petition, the return and the traverse.

In limine the respondents interposed the objection that the petitioner had not exhausted all the remedies
49 available to him before military tribunals and that, therefore, this proceeding has been brought prematurely. This contention would be completely sustained by *Gusik v. Schilder*, 340 U. S. 128, if that case stood alone. Subsequent decisions of the Supreme Court, however, throw a different light on this question.

The case of Toth is illuminating in this connection. Toth had served in the Air Force in Korea. After he was discharged from the service, he returned to his home in Pittsburgh, and resumed his civilian occupation. He was later arrested by the Air Force police and transported to Korea for trial by court-martial on a charge of murder alleged to have been committed while he was in the service. The District Court for the District of Columbia issued and sustained a writ of *habeas corpus*, and discharged Toth

on the ground that the Uniform Code of Military Justice did not authorize the removal of a civilian to a distant point for trial by court-martial.¹ The court expressly stated that the objection to the jurisdiction of the court-martial to try Toth, based on constitutional grounds was premature. The Court of Appeals for the District of Columbia Circuit reversed the order of the District Court.² On certiorari the Supreme Court reversed the decision of the Court of Appeals and reinstated the action of the District Court.³ The Supreme Court, however, did not confine itself to passing on the narrow point on which the District Court predicated its decision, but held broadly that Congress lacked power to authorize trial by court-martial of a person in the position of Toth. This
 50 conclusion was reached in spite of the fact that Toth had made no effort to exhaust his remedies within the military system.

In *Reid v. Covert*, 354 U. S. 1, 4, the Supreme Court held that there was no constitutional authority to try the respondent by court-martial and directed that she be released from custody, in spite of the fact that she had not exhausted her remedies in the military system. As appears from the opinion of the court, a re-trial by court-martial as a result of a reversal of the conviction by the Court of Military Appeals was pending when the case was argued and decided by the Supreme Court. To be sure, it does not appear that the objection that was a failure to exhaust prior remedies was urged by the Government in either of these cases. Nevertheless, it could have been raised by the Court *sua sponte*. It would not be appropriate for this court to assume that in spite of its decision in the *Gusik* case, *supra*, the Supreme Court overlooked the point in the *Toth* and *Reid* cases. That this matter was not mentioned in either opinion, may be due merely to the fact that the Court did not consider it worthy of discussion. This court cannot reasonably reach any conclusion other than that the *Gusik* case has been overruled *sub silentio* by the *Toth* and *Reid* cases, insofar as it

¹ *Toth v. Talbott*, 114 F. Supp. 468.

² *Talbott v. United States ex rel. Toth*, 94 U.S. App. D.C. 28.

³ *United States ex rel. Toth v. Quarles*, 350 U.S. 11.

applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court-martial is challenged on constitutional grounds. Consequently, the objection that the petitioner has failed to exhaust all of his remedies within the military system is overruled.

This brings us to a consideration of the merits. Jurisdiction of courts-martial over the person of the
 51 petitioner in this proceeding is predicated on Article
 2 of the Uniform Code of Military Justice (formerly
 50 U.S.C. § 552; now 10 U.S.C. § 802), the pertinent provisions of which are as follows:

“The following persons are subject to this chapter:

.

“(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *persons serving with, employed by, or accompanying the armed forces outside the United States* and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.” (Emphasis supplied.)

It is contended by the petitioner that subsection (11), insofar as it is applicable to civilians, is unconstitutional in that it deprives them of the right not be prosecuted for a criminal offense except by indictment by a grand jury, and of the right to trial by jury.

The pertinent constitutional provisions are the following:

Article I, Section 8, Clause 14:

“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces;”

Article III, Section 2 Clause 3:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State,

the Trial shall be at such Place or Places as the Congress may by Law have directed.”

The Fifth Amendment, Clause 1:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, . . .”

52 *The Sixth Amendment, Clause 1:*

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .”

It is well established beyond the necessity of discussion that the power of the Congress to make rules for the government and regulation of the land and naval forces, includes the authority to provide for trials by courts-martial, and that in cases cognizable by military tribunals, neither the right to indictment by grand jury as a basis for a prosecution, nor the right to a trial by jury is applicable.⁴ The ultimate question to be decided in connection with the resolution of the constitutional issue in this case, is to what groups of persons may the Congress extend court-martial jurisdiction. More specifically the query is whether for the purposes of Article I, Section 8, Clause 14, the phrase, “land and naval forces”, is to be limited to commissioned and enlisted personnel in uniform, or whether it may include civilian employees who are attached to the land or naval forces and perform duties in connection with their maintenance or operation.

A consideration of this topic should properly begin with a scrutiny of the rulings of the Supreme Court in this field. In making such an analysis, we must be guided by the precepts enunciated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399-400:

⁴ *Ex parte Milligan*, 4 Wall. 2, 123.

Ex parte Quirin, 317 U.S. 1, 40.

Whelchel v. McDonald, 340 U.S. 122, 127.

53 "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Our attention must be directed to two cases. In *United States ex rel. Toth v. Quarles*, 350 U. S. 11, it was held that a former member of the armed forces who had been discharged from the service and was no longer within the control of the armed forces, was not subject to trial by court-martial for an offense committed during his term of service.

Reid v. Covert, 354 U. S. 1, involved the status of a wife of a member of the armed forces of the United States, who accompanied her husband while he was stationed on foreign soil. This case was heard and decided by eight members of the Supreme Court, as Mr. Justice Whittaker did not participate. Mr. Justice Black delivered an opinion in which the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined, and in which the view was expressed that civilian wives, children, and other dependents of members of the armed forces, could not be constitutionally subjected to trial by court-martial, since they could not be regarded as any part of the armed forces. It must be emphasized that this conclusion was reached by only four members of the Court. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions concurring in the result, but limiting their conclusion to the view that in capital cases civilian dependents of members of the armed forces could not be constitutionally tried by court-martial. Mr. Justice Clark, with whom Mr. Justice Burton joined, wrote a dissenting opinion. Consequently, the only point on

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which a majority of the Justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court-martial. Six Justices joined in that view.

The state of the Supreme Court's decisions on this question may, therefore, be summarized as follows:

A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country, is subject to trial by court-martial.

Obviously, the position of civilian employees is not only different in fact, but distinct in principle from that of members of service men's families. The use of civilian employees is necessary and sometimes indispensable for the operation of the armed forces. To that extent they may be deemed part of the armed forces. This is not the case with families of service men. The families are present for the mutual comfort and happiness of the military personnel and their wives and children, but the armed forces can readily operate without the presence of families.

Mr. Justice Black in *Reid v. Covert, supra*, at page 23, expressly recognized that "there might be circumstances

55 where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military, or did not wear a uniform." He added, "But the wives, children and other dependents of servicemen cannot be placed in that category, . . ." Thus, members of the Supreme Court have recognized a distinction in principle between depend-

ents of servicemen and civilian employees of the armed forces.

In determining whether the words "land and naval forces" as used in Article I, Section 8, Clause 14, of the Constitution, are to be restricted to the uniformed personnel formally mustered into the service, or should also include civilian employees attached to the armed forces, it is necessary to consider the background of the constitutional provision.⁵ It is also essential to bear in mind certain general historic principles of constitutional interpretation and construction. The constitutional history of the United States demonstrates that one of the forces that transformed a weak, loose confederacy of thirteen small colonies nestled against the Atlantic Coast into a large, powerful and prosperous nation, has been the fact that a broad and liberal construction has been placed by the Supreme Court on the enumerated powers of the Congress, thus enabling the building of a strong central government that can withstand the vicissitudes of time. This policy was inaugurated by the historic, epoch-making opinions of Chief Justice Marshall, who was an outstanding statesman, endowed with far-sighted vision, as well as a renowned jurist. It would seem surplusage to quote his memorable words in *McCulloch v. Maryland*, 4 Wheat. 316, that
 56 ring through the ages. They are often repeated and are all too familiar.

A similar but less well known expression is found in an opinion of Justice Story in *Martin v. Hunter*, 1 Wheat. 304, 326-327:

"The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.

⁵ *Gompers v. United States*, 233 U.S. 604, 610.

It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."⁶

The historic background of Clause 14 is significant. It is hardly necessary to advert to the fact that the framers of the Constitution were men of profound learning, but that they were also men of broad practical experience, who were in close contact with the problems of their
57 day and who had a thorough knowledge of the needs in the light of which the Constitution was being framed. The British Articles of War of 1765, which were in force at the beginning of the Revolutionary War, placed civilian employees, contractors and suppliers connected with the Army under military discipline. Thus Article XXIII provided:⁷

"All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War."

The American Revolutionary Army was governed by similar provisions. Article XXXII of the Articles of War, adopted by the Continental Congress, on June 30, 1775, read as follows:⁸

⁶ Among the many cases expressing and applying the doctrine of broad construction of congressional powers, the following are typical:

Gibbons v. Ogden, 9 Wheat. 1, 187-9, 222.

Legal Tender Cases, 12 Wall. 457, 532.

Juilliard v. Greenman, 110 U.S. 421, 439.

Matter of Strauss, 197 U.S. 324, 330-331.

⁷ William Winthrop, *Military Law and Precedents*, 2d Ed., p. 941.

⁸ Journals of the Continental Congress, Volume II, 1775, p. 116.

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules and regulations of the continental army."

A like enactment is found in Section XIII, Article 23, of the Articles of War, adopted by the Continental Congress on September 20, 1776:⁹

"All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier; are to be subject to orders, according to the rules and discipline of war."

58 It was against this background that the members of the Constitutional Convention of 1787 formulated the provision empowering the Congress to make rules and regulations for the government of the land and naval forces of the United States. It is reasonable to infer that the framers of the Constitution were familiar with previous English and American usage in the matter and, therefore, employed the term "land and naval forces" in a broad sense. Such has also been the continuous construction of this phrase by the Congress from the early days of the Republic. Early congressional interpretation of a constitutional provision at a time when some of the Founding Fathers were still living and active, is particularly significant. Great weight must be attached to such contemporaneous construction.¹⁰ Similarly, continuous construction of a constitutional provision by repeated Acts of Congress and long acquiescence in such an interpretation "entitles the question to be considered at rest".¹¹

⁹ Journals of the Continental Congress, Volume V, 1776, p. 800.

¹⁰ *Cohens v. Virginia*, 6 Wheat. 264, 418.

Cooley v. Board of Wardens of Port of Philadelphia et al., 12 How. 299, 315.

Lithographic Co. v. Sarony, 111 U.S. 53, 57.

McPherson v. Blacker, 146 U.S. 1, 27.

Knowlton v. Moore, 178 U.S. 41, 56.

¹¹ *Prigg v. Pennsylvania*, 16 Pet. 539, 621.

See also, *The Laura*, 114 U.S. 411, 416.

Springer v. United States, 102 U.S. 586, 599.

Field v. Clark, 143 U.S. 649, 691.

The Articles of War enacted by Congress from time to time have invariably applied court-martial jurisdiction to civilian employees and similar persons attached to the armed forces in the field. The first group of Articles of

War passed by the Congress were approved on 59 April 10, 1806. Article 60 provided as follows:¹²

“Article 60. All suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”

The Articles of War were revised in 1874. Article 63 of that revision reads as follows:¹³

“Art. 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”

Another revision of the Articles of War was dated August 29, 1916. Article 2 enumerates the groups of persons subject to military law, and includes the following:¹⁴

“(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; . . .”

Precisely the same provision is found in the Articles of War passed in 1920.¹⁵ The Uniform Code of Military

¹² 2 Stat. 366.

¹³ 2 Rev. Stat. 236 (2d Ed., 1878).

¹⁴ 39 Stat. 651.

¹⁵ 41 Stat. 787, Art. 2(d).

Justice, adopted in 1952, contains a similar provision, which has been heretofore quoted.

60 Although, as indicated above, the precise question involved in the instant case has never been passed upon by the Supreme Court, other Federal courts that have had occasion to deal with this topic have uniformly held that civilian employees accompanying or serving with the armed forces of the United States outside of the territorial jurisdiction of the United States may be subjected to court-martial jurisdiction, *Hines v. Mikell* (C.C.A. 4th) 259 Fed. 28; *Ex parte Falls* (D.-N.J.) 251 Fed. 415; *Ex parte Jochen*, (S.D.-Tex.) 257 Fed. 200; *McCune v. Kilpatrick*, 53 F. Supp. 80; *In re Varney's Petition*, 141 F. Supp. 190. The United States Court of Military Appeals has reached the same conclusion, *United States v. Marker*, 1 USCMA 393; *United States v. Weiman*, 3 USCMA 216; *United States v. Burney*, 6 USCMA 776.¹⁶

The final clause of Article I, Section 8, of the Constitution sometimes denominated by historians as the "elastic clause", empowers the Congress to make all laws which shall be necessary and proper for carrying into execution "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." That a law subjecting personnel of the type involved in this case to trial by court-martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States

61 In foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties that in some instances might prove insuperable. One possible course is to establish Federal civilian courts abroad for the trial of offenses committed by civilian employees of

¹⁶ The opinion of Judge Latimer in *United States v. Burney*, cited in the text, contains an exhaustive and scholarly discussion of this subject.

the armed forces. Whether foreign governments would permit the exercise of such extra-territorial jurisdiction is doubtful. It has never been done in modern times except in occupied territory and except in the Orient by special agreements, which have been cast into discard. Moreover, it would not be practicable to obtain juries in foreign countries, for no one could be required to serve on a jury. Similarly, it would not be possible to issue compulsory process against witnesses.

Another possibility would be to bring such offenders back to the United States for trial. Such an arrangement would not be practicable as to serious offenses, for there would be no way of compelling the presence of witnesses. They could be induced to come only on a voluntary basis. As to petty offenses, this course would be too costly and cumbersome. The third possible course is to turn such offenders over to foreign courts for trial.¹⁷

62 In the light of the foregoing discussion, the court reaches the conclusion that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial and that hence Article 2, subsection (11) of the Uniform Code of Military Justice is constitutional; that the court-martial by which the petitioner was tried had jurisdiction over him; and that, consequently, the petitioner is not unlawfully restrained of his liberty.

The order to show cause is discharged and the petition is dismissed.

ALEXANDER HOLTZOFF
United States District Judge.

January 13, 1958.

¹⁷ See concurring opinion of Mr. Justice Harlan in *Reid v. Covert*, 354 U. S. 1, p. 76, note 12.

Joseph M. Snee, S.J., and Kenneth A. Pye, in their work on "*Status of Forces Agreement; Criminal Jurisdiction*", p. 44, state that the fundamental choice is not between a Federal civilian court and an American court-martial, but between an American court martial and a foreign court.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(File Endorsement Omitted)

Notice of Appeal—Filed January 15, 1958

Notice is hereby given this 15th day of January, 1958, that Petitioner hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of January, 1958 in favor of Respondents against said Petitioner.

MICHAEL A. SCHUCHAT
Attorney for Petitioner

Serve
U S Attorney
Please.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed Sep. 12, 1958, Joseph W. Stewart, Clerk

No. 14304

UNITED STATES OF AMERICA, EX REL
DOMINIC GUAGLIARDO, *Appellant*

v.

NEIL H. McELROY, SECRETARY OF DEFENSE,
DEPARTMENT OF DEFENSE, ET AL., *Appellees*

Appeal from the United States District Court for the
District of Columbia

Opinion—September 12, 1958

Mr. Michael A. Schuchat for appellant.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief for appellee.

Before EDGERTON, *Chief Judge*, and FAHY and BURGER,
Circuit Judges.

FAHY, *Circuit Judge*: Appellant was a civil service employee of the Department of the Air Force of the United States, employed as an electrical lineman at the Nouasseur Air Depot near Casablanca, Morocco. His duties were to maintain and repair airfield lighting and to inspect and repair electrical conduits, transformers, lights, controls, ducts, and manholes. He lived with his wife off the Depot, in nearby Casablanca. He was entitled to quarters allowance, mail, Commissary and Base Exchange privileges, a United States Air Force ration card, membership in the Air Force Officers Club, and medical and dental care at the Depot.

On July 18, 1957, he and two enlisted men¹ were charged with stealing certain leatherette goods and fabric material at the Depot, in violation of Art. 121, Uniform Code of Military Justice, 10 U.S.C. § 921 (Supp. V, 1958), and with conspiring to commit larceny, in violation of Art. 81, U.C.M.J., 10 U.S.C. § 881 (Supp. V, 1958). They were tried by a general court-martial and found guilty. Appellant was sentenced to pay a fine of \$1,000 and to be confined at hard labor for three years.

In due course the case reached the Board of Review in the Office of the Judge Advocate General, pursuant to Art. 66, U.C.M.J., 10 U.S.C. § 866 (Supp. V, 1958). Appellant then petitioned the United States District Court for the District of Columbia for a writ of habeas corpus. He contended that the military authorities lacked jurisdiction to try him and that accordingly his confinement under the court-martial sentence was unlawful. Relief was denied by the District Court, opinion reported at 158 F. Supp. 171, followed by this appeal.²

Appellees³ contend that the jurisdictional question is prematurely raised because appellant has not exhausted the judicial processes available to him under the Uniform Code

¹ One or more civilian Moroccan nationals were also alleged to have been parties to the same transaction. They have been tried in the regular courts of Morocco.

² We ordered appellant admitted to bail pending the appeal.

³ Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of the Air Force, and General Thomas D. White, Chief of Staff, United States Air Force.

73 of Military Justice. They rely upon *Gusik v. Schilder*, 340 U.S. 128. But that case we think is inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army. He sought to attack collaterally a court-martial judgment because of alleged errors in the court-martial proceedings, without exhausting the administrative remedies available for their correction. Here, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all. Habeas corpus proceedings were used to determine such a question in *Reid v. Covert*, 354 U.S. 1, and *United States ex rel. Toth v. Quarles*, 350 U.S. 11.⁴ The point was not discussed, but in view of *Gusik v. Schilder*, *supra*, could not have been overlooked by the Supreme Court, especially as the Court in *Reid v. Covert* specifically noted that the petition was brought "while Mrs. Covert was being held . . . pending a proposed retrial by court-martial . . ." 354 U.S. at 4. If appellees have no court-martial jurisdiction whatever over appellant the Great Writ is available to release him from their custody.

Appellees defend their jurisdiction solely by reason of Art. 2, U.C.M.J., 10 U.S.C. § 802 (Supp. V, 1958). This provision in terms does extend court-martial jurisdiction to appellant for the offense charged. The provision reads:

The following persons are subject to this chapter
[The Uniform Code of Military Justice]:

. . . .

74 (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States

⁴ Moreover, the highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case. *United States v. Wilson*, No. 9638, U.S.C.M.A., March 28, 1958; *United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313; *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98; *United States v. Marker*, 1 U.S.C.M.A., 393, C.M.R. 127.

Appellant's contention is that this provision is unconstitutional as applied to him, a civilian employee, in time of peace.

The question thus raised must be decided in light of the decision of the Supreme Court in *Reid v. Covert, supra*. The Court there held that in a capital case the wife of a member of the armed forces, who accompanied her husband abroad and there killed him, could not be tried by court-martial—that Art. 2 subparagraph (11), *supra*, was unconstitutional as so applied. The basis for the decision was that the wife was entitled to a jury trial as provided by Art. III, § 2 of the Constitution and to the safeguards of the Fifth and Sixth Amendments.

Article III, § 2 of the Constitution provides that the trial of all crimes excepting cases of impeachment shall be by jury. The pertinent Fifth Amendment provision is that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury except in cases arising in the land or naval forces. The pertinent Sixth Amendment provision is that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. None of these provisions was complied with in *Reid v. Covert*. And none was complied with in the present case.

Appellees point, however, as was done in *Reid v. Covert*, to Art. I, § 8, cl. 14, of the Constitution, which empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It is urged that this provision, together with the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 18, has enabled Congress to establish the court-martial jurisdiction specified in subparagraph (11) of Art. 2, U.C.M.J., *supra*, by carving out exceptions to the application of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments. Clearly the Constitution does authorize such an exception for members of "the land and naval Forces." But in *Reid v. Covert* the Chief Justice and Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan, in the opinion written by Mr. Justice Black, would not permit an exception related to the "land and naval Forces" to in-

clude civilians unless in rare and unusual circumstances; and Mr. Justice Frankfurter and Mr. Justice Harlan would not permit such an exception to include a civilian wife charged with a capital offense, though accompanying her service husband with the forces outside the United States.

The same considerations, set forth elaborately in the opinions, which thus brought agreement among a majority of the Supreme Court as to the wife in *Reid v. Covert*, would not permit a civilian employee in the situation of appellant to be tried by the United States by court-martial on a capital charge. He would be entitled to a civilian trial by jury. We can think of no constitutional basis for approving the court-martial of such an employee for a capital offense which would not apply equally to Mrs. Covert. Of course the case before us is not a capital one, but if Mrs. Covert or an employee such as appellant could not be tried by court-martial on a capital charge, notwithstanding the provision of the Military Code purporting to authorize such a trial, the existing congressional plan for extending court-martial jurisdiction to persons accompanying or employed by the armed forces outside the United States exceeds constitutional bounds. Congress did not exclude capital cases. The statute embraces without exception persons "employed by" the forces outside the United States and thus would deprive all civilians in that category of the right to trial by jury for any offense defined in the Military Code, capital or non-capital, and regardless of the nature of the offense or of the relation of the offense or of the employment to the security, discipline, or effectiveness of the forces. The scope of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as expounded in *Reid v. Covert*, prevents such a curtailment of trial by jury and concomitant extension of court-martial jurisdiction over civilians in time of peace.

This is not to say that legislation bringing some civilian employees within court-martial jurisdiction for some offenses would necessarily be unconstitutional. Cf. *Reid v. Covert*, 354 U.S. at 22-23. It is reasonable to assume that the fullness of the Necessary and Proper Clause, considered with the authority of Congress "to make Rules for the Government and Regulation of the land and naval Forces," and considered also with the present and potential respon-

sibilities of the United States throughout the world, has not been exhausted. But *Reid v. Covert* plainly shows that these sources of legislative power do not sustain the all-inclusive extension of military jurisdiction over civilian employees attempted by subparagraph (11) of Art. 2 of the Military Code.

Since the intended broad sweep of subparagraph (11) is unconstitutional the question arises whether the courts should rewrite the provision along narrower lines and decide the question of its validity as applied to this particular employee for this particular offense. There are numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted. *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126; *Employers' Liability Cases*, 207 U.S. 463, 496-504; *Illinois Cent. R. v. McKendree*, 203 U.S. 515, 528-30; *United States v. Ju Toy*, 198 U.S. 253, 262-63; *James v. Bowman*, 190 U.S. 127, 139-42; *Baldwin v. Franks*, 120 U.S. 678; *United States v. Harris*, 106 U.S. 629, 641-42; *Trade Mark Cases*, 100 U.S. 82, 98-99; *United States v. Reese*, 92 U.S. 214, 221. See, also, *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-17; *Williams v. Standard Oil Co.*, 278 U.S. 235, 242; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518-22; *Hill v. Wallace*, 259 U.S. 44, 70.

77 In *Reese* the Court said:

We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. . . .

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment . . .

92 U.S. at 221.

In the *Trade Mark Cases*, *supra*, the same principle is stated as follows:

[I]t is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

100 U.S. at 98.⁵

In *Yu Cong Eng* the opinion was by Mr. Chief Justice Taft and contains this language:

The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its
78 application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity.

271 U.S. at 522.

The case at bar is not one where Congress has laid down a definition of jurisdiction in terms taken from the Constitution, leaving administrative agencies and the courts to apply the definition by a process of inclusion and exclusion according to the facts of particular cases, as was *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31.

Appellees urge, however, that since the statute contains a severability clause the doctrine of the *Reese* and kindred cases does not apply. Section 49(d) of the Act of August 10, 1956, Public Law 1028, 84th Cong.,⁶ provides:

⁵ While in *Reese* and the *Trade Mark Cases* the Court spoke of crimes defined so broadly as to be beyond constitutional authority, the principle invoked in those cases applies to this attempted extension of court-martial jurisdiction over crimes or persons in such broad terms as to be unconstitutional.

⁶ Public Law 1028 enacted into positive law Title 10 of the United States Code, containing, *inter alia*, the Uniform Code of Military Justice. The severability clause, though a part of Public Law 1028, was not enacted into Title 10. It can be found however in the note at page 293 of Supplement V of the 1952 Code (1958).

If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

As the Supreme Court held in *Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42, the general effect of a severability clause is to substitute for the presumption that the legislature intended its act to be effective as an entirety, the opposite presumption of severability; that is, that the legislature intended the act to be divisible. It is said that this presumption must be overcome by considerations which make evident the inseverability of the provisions of the statute, or the clear probability that with the invalid part eliminated the legislature would not have been satisfied with what remains. In *Williams* itself, though the statute was not penal and also contained a severability clause the Court said:

it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration.

278 U.S. at 242.

To the same effect is *Hill v. Wallace*, 259 U.S. 44, 70. Other cases relied upon by appellees include *Virginia Ry. v. System Federation No. 40*, 300 U.S. 515; *Wright v. Vinton Branch Bank*, 300 U.S. 440; *Crowell v. Benson*, 285 U.S. 22; *St. Louis, S.W. Ry. v. Arkansas*, 235 U.S. 350; *The Abby Dodge*, 223 U.S. 166; *United States v. Delaware and Hudson Co.*, 213 U.S. 366.

We do not think the severability clause authorizes us to divide subparagraph (11) so as to raise the question whether or not persons in appellant's situation might validly be subjected to court-martial jurisdiction. Though *Reid v. Covert* involved a wife and not a civilian employee, we know from that decision that the intended broad coverage of civilians, whether accompanying or employed by the forces abroad, exceeds constitutional bounds. Neither the severability clause nor any other provision affords any standard to guide a constitutional decision in the instant

case except the invalid standard of "persons . . . employed by" the armed forces outside the United States. We do not know how to subdivide this provision as Congress might have done if Congress had known it could not be upheld as written. The present severability clause shows only a very general intention to leave in effect all valid applications which are severable from invalid applications, giving no indication of what valid applications Congress thought would be severable. Should we undertake to say that the "persons employed by" clause is divisible so as to apply to
80 appellant we would be called upon to decide whether
 civilians in general employed by the armed forces
 outside the United States in time of peace are subject
to court-martial jurisdiction. Four members of the Supreme Court in *Reid v. Covert* have said in effect that they are not subject to such jurisdiction; and a majority of the court has not indicated that they are.

The Supreme Court has repeatedly referred to "the wisdom of refraining from avoidable constitutional pronouncements." *United States v. International Auto. Workers*; 352 U.S. 567, 590. This settled principle leads us to decide this case on the ground of nonseverability. Should we hold severable the application of the statute to appellant for the crime here charged, and go on to decide whether his conviction by court-martial was constitutional, obviously we would be deciding an important constitutional question. This course is not required and, therefore, should not be pursued in the circumstances of this case. The relevant precedents call for a decision on the basis spelled out in the *Reese* and kindred cases. Under those decisions we hold that subparagraph (11), which the Supreme Court has held is invalid as presently enacted, *Reid v. Covert*, is nonseverable into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application. At least the application of the subparagraph to such a civilian as appellant, charged with such an offense as is here involved, cannot be validly carved out of the invalid general spread of that provision.

Our decision leaves Congress free if it so desires to rewrite the legislation with inclusion of criteria for court-martial jurisdiction in terms related more definitely to the

security, discipline, and effectiveness of the armed forces abroad. Or Congress might decide in light of *Reid v. Covert* to adopt some other course for the trial by the United States of civilians employed with such forces in time of peace. These legislative matters are not for us to determine; we mention these possibilities because they
81 bear upon the reasons for our decision that the present generality of subparagraph (11) is not to be subdivided by the courts so as to include appellant when the provision cannot validly include all who were intended to be covered by its terms as the statute left the hands of Congress. There is a complete absence of any legislative standard for the inclusion of appellant other than a standard that includes all civilian employees with the forces abroad, and that standard is so extensive as to be invalid as a basis for denial to civilians tried by the United States in time of peace of the protection of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments.⁷

Appellant should be discharged from the custody of appellees.⁸

Reversed and remanded.

BURGER, *Circuit Judge*, dissenting: The majority holds invalid a conviction of a civilian employed overseas by the Air Force, under Article 2, Uniform Code of Military Justice, for theft of Government property (valued at over \$4000). They do this even though, as I shall try to demonstrate, there is no other feasible means of law enforcement available at a foreign military base for crimes against the United States. While purporting to make a narrow decision, the consequence of the majority holding is to
82 strike down, for all practical purposes, all of the Uniform Code of Military Justice which relates to trial of non-military personnel in peacetime. This holding is

⁷ The principle invoked by appellees that a person may attack as invalid only the attempted invasion of his own rights is not applicable, for the attempted application here is to appellant himself.

⁸ Since submission of the case we have been advised by the United States Attorney that on June 9, 1958, the United States Court of Military Appeals has denied appellant's petition for a grant of review of his court-martial conviction.

reached by two steps (a) the authority of *Reid v. Covert*¹ and (b) that this court cannot sever the part of the statute relating to "persons accompanying . . . the armed forces outside the United States" from that part of the statute relating to "persons serving with, [or] employed by . . . the armed forces outside the United States." (10 U.S.C. § 802(11), Art. 2 UCMJ)

First, *Reid v. Covert* does not warrant the conclusion reached by the majority, and second, the statutory intent as well as the explicit language renders "persons serving with [or] employed by" so readily distinguishable and severable from "persons accompanying" members of the armed forces that no real problem of statutory construction is involved. I therefore see no escape from meeting the constitutional issue and do not think the majority has succeeded in avoiding that issue.

Article I, § 8, cl. 14, of the Constitution empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It has been held that this grant empowers Congress to make rules governing this defined class without strict regard for certain constitutional guarantees applicable to citizens generally.² The inquiry here is whether Clause 14, properly interpreted in its constitutional context, empowers Congress to provide for military trials in non-capital cases of United States civilians employed overseas by the armed forces in peacetime. The Supreme Court's holding that Congress did not have the power to provide for such court-martial trials of military *dependents* charged with *capital* offenses 83 by implication declared unconstitutional one phrase of Article 2(11) of the Uniform Code of Military Justice, and that phrase only insofar as it relates to capital offenses. *United States v. Dial*, 9 U.S.C.M.A. 541, 26 C.M.R.

¹ 354 U.S. 1 (1957), *rehearing and reversing*, 351 U.S. 487 (1956), and *Kinsella v. Krueger*, 351 U.S. 470 (1956).

² *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857); *Ex parte Reed*, 100 U.S. 13 (1879). Among those constitutional rights which Congress may deny to this defined class are trial by jury and venue requirements (Art. III, § 2, and amend. VI), indictment by grand jury (amend. V).

321 (1958).³ The majority here extends the scope of *Reid v. Covert* in two directions: first, to civilian employees (as distinguished from dependents), and second, to non-capital cases.

Judicial caution, always appropriate in dealing with such far reaching matters as this, is especially in order where, as here, the joint action of the Legislative and Executive Branches under scrutiny deals with the national defense and delicate matters of foreign policy.⁴ The presumptions of constitutionality should not be quickly cast aside merely because a closely connected but legally unrelated portion of the same statute has previously been declared unconstitutional.

Article 2 of the Uniform Code of Military Justice⁵ lists various categories of persons who are subject to military jurisdiction. Subsection (11) so classifies "persons serving with, employed by, or accompanying the armed forces outside the United States" *Reid v. Covert* invalidates

84 by implication only that part applying to "persons accompanying," but my colleagues find it impossible to divide subparagraph (11) so as to sustain the distinction between "persons accompanying" on the one hand and "persons serving with [or] employed by" on the other. *Reid v. Covert* itself, the single case on which they rely, furnishes one basis for this distinction.

³ The "persons accompanying" phrase of art. 2(11), UCMJ, 10 U.S.C. § 802(11) (Supp. V., 1958). The United States District Court of West Virginia, subsequent to the above opinion of the Court of Military Appeals, released Mrs. Dial on a writ of habeas corpus, declining to distinguish between capital and non-capital cases with respect to the constitutional power of Congress over wives of servicemen. *United States ex rel. Singleton v. Kinsella*, 164 F. Supp. 707 (S.D.W. Va. 1958).

⁴ "These powers ['to raise armies; to build and equip fleets; to prescribe rules for the government of both . . .'] ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or . . . means which may be necessary to satisfy them. The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *THE FEDERALIST* No. 23, at 145 (Ford ed. 1898) (Hamilton) (Emphasis not added.).

⁵ 10 U.S.C. § 802 (Supp. V. 1958).

I

The opinion of Mr. Justice Black, in which he speaks for four members of the Court (himself, the Chief Justice and Justices Douglas and Brennan), is very carefully limited to "wives, children and other dependents of servicemen." (354 U.S. at 23.) It expressly recognizes "that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not been inducted into the military or did not wear a uniform." (354 U.S. at 23.)

Justice Black's opinion declares that military jurisdiction can never be extended to "civilians," but it scrupulously refrains from drawing a clear line of the boundary between civilians and persons "in" the armed forces. Although it explicitly rejects the argument that the Necessary and Proper Clause could justify extension of military jurisdiction "to any group of persons beyond that class described in Clause 14" (354 U.S. at 20-21), it avoids delineating that class with precision. Indeed, the very language quoted above clearly indicates that the class might well include civilian employees as distinguished from dependents, or at the least, some of them.

Mr. Justice Frankfurter, concurring separately, was unwilling to read Clause 14 in isolation from the Necessary and Proper Clause. Only by reading the two clauses together, he said, may there "be avoided a strangling literalness in construing a document that is not an enumeration of static rules but the living framework of government designed for an undefined future." (354 U.S. at 43.) Mr.

85 Justice Frankfurter was articulating the same warning we find in the FEDERALIST No. 23 dealing with congressional powers "to raise armies." The test he proposed for determining whether the Constitution permits trial of a given civilian for a given crime is whether that person was "so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that [he] may be subjected to court-martial jurisdiction" (354 U.S. at 44) for his particular offense. Justice Frankfurter's concurrence was accordingly limited to the position that Congress may not in peacetime provide for military trials of *civilian dependents* charged with *capital* offenses without

a grand jury indictment and trial by jury. He makes this "narrow delineation of the issue" (354 U.S. at 45) clear beyond any possible doubt.

Mr. Justice Harlan, in his separate concurrence, also disagreed with Justice Black's dictum that Clause 14 power "was intended to be unmodified by the Necessary and Proper Clause." (354 U.S. at 67.) He emphasizes the position, also taken by Mr. Justice Frankfurter, that special considerations apply in cases involving capital offenses. He warned that the Court should not unnecessarily foreclose its "future consideration of the broad questions involved in maintaining the effectiveness of . . . national [military] outposts" (354 U.S. at 77) by deciding more than was directly involved in the case before it.

The position of the majority of this court is that when the Supreme Court struck down that part of Article 2(11) relating to capital cases involving "persons accompanying the armed forces," it unavoidably struck down Article 2(11) in its entirety, and thereby destroyed all authority to try by courts-martial persons "serving with [or] employed by" the armed forces charged with non-capital offenses. Nothing held, or even intimated by the Supreme Court warrants this result, and familiar rules for judicial guidance dictate two courses which would lead to the result I urge: first, this case is readily distinguishable, on its facts, from *Reid v. Covert*; second, we should not hold non-severable a part of the statute which is in no way dependent on or logically related to that part invalidated by the Supreme Court.

The three opinions in *Reid v. Covert* indicate that there are two approaches which may be used to distinguish the present case from the one decided there. First, on the approach of Mr. Justice Black, I suggest that appellant may well be "in" the armed forces for the purposes of Clause 14 jurisdiction and that that Clause, considered in isolation, justifies military jurisdiction in this case. Second, on the approach suggested by the concurring opinions, I conclude that military jurisdiction is warranted here even if it be thought that appellant was not within the specific class delimited by Clause 14.² These conclusions are plainly consistent with the holding of *Reid*

v. *Covert*, unless we ignore the distinctions so carefully drawn there by all the opinions.

Even if the conclusion is ultimately reached that "persons serving with [or] employed by" may not be subjected to military jurisdiction, the reasoning and the route must be different. The problem of constitutional interpretation inescapably presented by this case cannot be side-stepped by citing *Reid v. Covert* as controlling. It will take a new or different step to reach the conclusion that the Constitution prohibits exercise of military jurisdiction in the case now before us.

II

In *Reid v. Covert* the Court considered historical precedent for court-martial jurisdiction over civilians and found that British constitutional history since the Revolution of 1689 and American history strongly compelled the result

that was reached.⁶ This same historical approach
87 supplies us with one solid criterion for distinguishing the present case from *Reid v. Covert*. Ever since 1689 military law has been regarded by English speaking people as an unwelcome but necessary abridgment of civil rights. The first British Mutiny Act (1689), after declaring that no man should be punished except by a judgment of his peers, proceeded: "Yet, nevertheless, it being requisite for retaining such Forces . . . in their Duty an exact discipline be observed."⁷ Despite the pervading desire evidenced here and elsewhere⁸ to place all possible limitations upon the jurisdiction of courts-martial, the British Articles of War in force at the time of our Revolution provided that

"All Suttlers and Retainers to a Camp, and all Persons whatsoever, *serving with* Our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders

⁶ Justice Black's opinion, 354 U.S. at 23-35.

⁷ As reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 929 (2d ed., Reprint 1920) (hereinafter cited as WINTHROP).

⁸ See the various authorities cited by Mr. Justice Black, 354 U.S. at 24-28; see also the report of Parliamentary debates on the British Mutiny Act (1689) set out in 19 RAPIN, *HISTORY OF ENGLAND* 188-92 (5th ed. Tindal 1763).

according to the Rules and Discipline of War.”
(Emphasis added.)⁹

A substantially identical provision was enacted by the Continental Congress in 1775,¹⁰ was reenacted in 1776,¹¹ and again included in the first Articles of War enacted after the Constitution, in 1806.¹²

88 Although there is surely reasonable debate over the meaning of the phrase “in the field” as it is used in these articles, there can be no doubt that all of these statutes make allowance for persons “serving with” the armed forces while remaining silent concerning those “accompanying” the army. This is more than a mere verbal distinction. Although there is some slight authority for holding wives of soldiers subject to court-martial under these provisions,¹³ there is definite emphasis on the element of “serving.” The fact that two classes of employees—suttlers and retainers—were used surely must be regarded as significant. Whatever disagreement there may be over the precise construction of these articles, it cannot be disputed that, under certain circumstances, military court-martial jurisdiction over civilian employees of the armed forces was standard practice at the time the Constitution was adopted. Provision for such jurisdiction has been maintained in the statutes in some form ever since.¹⁴

This power has been repeatedly upheld as constitutional

⁹ British Articles of War of 1765, art. 23 section 14, reprinted in WINTHROP 941; the same provision is contained in the British Articles of War of 1774, art. 23, section 14, reprinted in DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 593 (3d ed. 1915).

¹⁰ 2 J. CONT. CONG. 116 (1775)

¹¹ 5 J. CONT. CONG. 800 (1776), reprinted in WINTHROP 967.

¹² 2 Stat. 366, reprinted in WINTHROP 981.

¹³ See WINTHROP 99 n.94 and authorities cited there.

¹⁴ Articles of War of 1806, art. 60, 2 Stat. 366, reprinted in WINTHROP 981; Articles of War of 1874, art. 63, REV. STAT. § 1342, p. 236 (1875), reprinted in WINTHROP 991; Articles of War of 1916, art. 2(d), 39 Stat. 651; UCMJ, art. 2(11), 10 U.S.C. § 802(11) (Supp. V, 1958).

with respect to its exercise during wartime.¹⁵ The central issue here is whether its peacetime exercise is constitutional. Several times it has been held so by various courts under circumstances substantially similar to those in the present case.¹⁶ On the other hand, no case prior to *Reid v. Covert* has been cited or found upholding military jurisdiction over the wife or other dependent of a serviceman, either in peace or war. Indeed, it was not until 1916 that Congress expanded the class subject to courts-martial by adding thereto "persons accompanying" the armed forces.¹⁷ Even then it was not made clear that this phrase included dependents, and the cases arising under it have involved employees, not dependents.¹⁸ Without doubt military jurisdiction over essential civilian employees at overseas bases would be sustained in wartime. There remains unanswered whether courts can take judicial notice of the fact that what we call peacetime is, except for degree, much like the sporadic, limited, undeclared warfare with savage Indian tribes and bands a hundred years ago.¹⁹ Under the majority holding a civilian employee of the military on duty in Korea in the 1950-54 period, declared only to be an "emergency," would be immune from punishment for stealing military supplies,

¹⁵ *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777, *dismissed as moot*, 328 U.S. 822 (1946); *Hines v. Mikell*, 259 Fed. 28 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919); *Grewe v. France*, 75 F.Supp. 433 (E.D. Wis. 1948); *In re Beñue*, 54 F.Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943); *In re Di Bartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943); *Ex parte Joehen*, 257 Fed. 200 (S.D. Tex. 1919); *Ex parte Falls*, 251 Fed. 415 (D.N.J. 1918); *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y. 1917).

¹⁶ *Matter of Varney*, 141 F.Supp. 190 (S.D. Cal. 1956); *United States v. Wilson*, 9 U.S.M.C.A. 60, 25 C.M.R. 322 (1958); *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956).

¹⁷ Articles of War of 1916, art. 2(d) 39 Stat. 651.

¹⁸ *E.g.*, *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777, *dismissed as moot*, 328 U.S. 822 (1946); *In re Di Bartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943). For the legislative history of this addition, see S. REP. No. 130, 64th Cong., 1st Sess. Pertinent portions are reprinted in *In re Di Bartolo*, *supra* at 932-33.

¹⁹ *Cf.* *U.S. v. Wiese*, No. CC 488, National Archives; *U.S. v. Trader*, No. HH 882, National Archives; *U.S. v. Barnard*, No. HH 895, National Archives; *U.S. v. Ringsmer*, No. HH 880, National Archives.

except as the "civilian government" of South Korea would try him under its criminal code—if any.

The authority for military jurisdiction, with respect both to its wartime and peacetime exercise, rests on Article 1, § 8, cl. 14, read together with the Necessary and Proper Clause.²⁰ Constitutional authority has thus been found for military jurisdiction over civilian employees of the armed forces who are serving outside the United States. Appellant contends, however, that this jurisdiction can be justified only by the existence of a declared state of war.²¹ While such authority must be strictly limited and its exercise scrutinized, it seems to me that circumstances exist other than a state of declared war, which warrant its employment until and unless a workable substitute can be devised.

In the words of THE FEDERALIST, "the circumstances which endanger the safety of nations are infinite and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."²² The circumstances which today endanger the safety of this and all free nations are utterly different in nature and degree from those which confronted the drafters of the Constitution. The unique perils we face could not be anticipated in the 1780's but the constitutional architects carefully recognized this and left the future reasonably free to deal with its own problems. Among the "unforeseeables" which they prophetically allowed for is the fact that while armies of that day depended chiefly on uniformed soldiers, today in what is technically "peace-
 91 time" there are roughly 25,000 civilian employees serving our armed forces at numerous military bases spread throughout the world. That military bases on this scale are maintained by us in peacetime is, in itself, a startling innovation since World War II. Yet the major-

²⁰ See, e.g., *Matter of Varney*, 141 F.Supp. 190 (S.D. Cal. 1956); *Ex parte Jochen*, 257 Fed. 200 (S.D. 1919); *United States v. Wilson*, 9 U.S.C.M.A. 60, 25 C.M.R. 322 (1958).

²¹ Brief for Appellant, p. 9.

²² THE FEDERALIST No. 23, at 145 (Ford ed. 1898) (Hamilton).

ity holds that Congress may not provide court-martial trial for these essential civilian employees at foreign bases.

This holding at once overlooks the changing world we live in, to which I have already alluded, and forges "constitutional shackles" on the power of Congress and the Executive to deal with present day realities. The "undeclared," "limited" and "cold wars" since 1950 have engaged more men than all the wars in which our country participated from our Revolution to World War I. Moreover it cannot be denied that many of the "persons serving with [or] employed by . . . the armed forces outside the United States" are more essential than the uniformed soldier; that a civilian electronics expert or chemical engineer may be more essential than some generals, where the function of the base is the maintenance of aircraft and readying atomic arms and ICBM's.

The majority opinion attempts to avoid the impact of all these hard and real considerations by relying on *Reid v. Covert*, but these very facts contribute to distinguishing the two cases. These, I am confident, were the considerations which impelled the Supreme Court there to emphasize the narrow scope of its holding. These, no doubt, were the factors that led Mr. Justice Harlan to inveigh against foreclosing "future consideration of the broad questions involved in maintaining the effectiveness of . . . national outposts."²³ Our present holding, if it stands, could have, and probably will have, a major impact on the effectiveness of our "national outposts" at a time when so-called limited warfare may be imminent in various parts of the world; at such a time, above all, none but the most imperative restraints should be imposed by the courts.

92 However expressed, the issue here is simple: it is the delicate problem of balancing important rights of citizens against the needs of maintaining efficient national security. In the narrow context of a capital offense by a wife of a soldier in *Reid v. Covert* the Court found the scales tipped in favor of the individual interest. No challenge to that holding is involved in here resolving the balance in favor of broad national interests. I believe further that the holding I suggest for this case should extend to all non-capital cases involving overseas civilian

²³ 354 U.S. at 77.

employees of the armed forces. The question should not be left open for further litigation on a case-by-case basis with the result that one employee would be amenable to military jurisdiction by virtue of a possibly more intimate connection with the services than appellant while another would not be. To do so would lead to unnecessary administrative as well as judicial chaos.²⁴ I do not reach the question of capital cases of those serving with or employed by the military.

IV

If there were a feasible means, reasonably available for dealing with this problem, Congress should be required to provide procedures for these civilian employees, securing for them indictment by grand jury and trial by jury. But in the absence of a feasible substitute, Clause 14 together with the Necessary and Proper Clause²⁵ seems to me to empower Congress to subject these employees to trial by court-martial. No such substitute is suggested by the majority and I am unable to find any substitute. Several alternatives come to mind as being possible, but none are practical or desirable. The six alternatives are (see footnotes for objections): (a) induct all employees into the service and place them in uniform regardless of training or pay rates; (b) leave trial for crimes committed abroad entirely in the hands of the foreign sovereign in whose territory the act occurred; (c) bring accused employees back to the United States for trial; (d) set up new Article III courts (either within or without the military establishment) to provide the constitutional procedures for overseas trials of U.S. civilians; (e) provide by employment contracts that these employees subject themselves to court-martial jurisdiction for trial of crimes committed outside the United States; (f) make

²⁴ See 71 HARV. L. REV. 140 (1957).

²⁵ In *Reid v. Covert* Mr. Justice Black, disagreeing with the majority of the Court, said we must read Art. I, § 8, cl. 14, in isolation, rather than with the Necessary and Proper Clause. Even conceding this, *arguendo*, the absence of a feasible substitute for overseas court-martial jurisdiction should be an important practical consideration when we undertake judicially to define the limits of the "armed forces." See text at pages 14-15, *supra*.

no attempt to punish these civilian employees for any crimes they might commit overseas, instead merely discharge them.²⁶

(a) This would not accomplish the desired result; it would not secure for these persons either by jury of indictment by grand jury. Furthermore, it is utterly impractical from the important standpoint of personnel management. Some of the skilled technicians probably command higher wages than generals; yet their jobs require them to work side by side with enlisted and non-commissioned personnel.

(b) Like the first suggestion, this also fails to guarantee the sought for constitutional rights. In some cases it might result in subjecting United States citizens to bizarre or "cruel and inhuman" punishments. In addition, if the employees were stationed in some barren area, not actually under the control of any government (*e.g.*, Antarctica) this alternative would not be available.

(c) This would tend to deprive the accused of the benefit of friendly witnesses. It would violate the fundamental principle that trial should be held where the crime occurred, a principle fought for in the Revolutionary War. In the DECLARATION OF INDEPENDENCE, one of the grievances listed charged the English with "transporting us beyond Seas to be tried for pretended offenses." See also Blumie, *The Place of Trial of Criminal Cases*, 41 MICH. L. REV. 59 (1944); Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 717-18 (1958).

(d) This would collide with the sovereign rights of the country where the crime was allegedly committed. Under the present "Status of Force" agreements these countries have granted us the limited privilege of exercising court martial jurisdiction over our armed forces and persons serving with them. These agreements constitute a substantial concession won only after lengthy negotiation, and it is extremely unlikely that many countries would be willing to permit us to encroach further. See *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess. (1953); Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

(e) There are serious doubts whether such a contract would be valid. Although all of the rights involved here may be waived under certain circumstances, the waiver must be surrounded with certain safeguards. See *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Patton v. United States*, 281 U.S. 276 (1930). In *Adams v. United States ex rel. McCann*, *supra*, the Court upheld a waiver of trial by jury in the absence of counsel; three justices (Murphy, Black, and Douglas) dissented, and the majority said that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury." 317 U.S. at 275. (Emphasis added.) Here the suggested waiver (by contract) would be made without two of the safeguards the Supreme Court has said are necessary.

(f) Abdication of all legal restraint is unrealistic. It would prejudice the rights and interests of the whole people and of citizens in the overseas community to secure a few rights for a small number; it would tend to break down discipline and would tend to be highly prejudicial to national prestige.

94 The problem of finding an alternative to courts-
 martial for the trial of *capital* charges against
 95 civilian *dependents* was considered by the Supreme
 Court in *Reid v. Covert*.²⁷ That limited situation
 does not pose as acute a problem for the administration
 of discipline in the armed forces as does the absence of
 any practical jurisdiction over *employee* for *all* charges.
 As Mr. Justice Frankfurter pointed out,²⁸ the incidence of
 capital charges brought overseas against dependents has
 been so small since the adoption of the Uniform Code
 of Military Justice that it does not merit great considera-
 tion. The two-phase extension of *Reid v. Covert* adopted
 here by the majority at once intensifies and enlarges the
 problem of a substitute jurisdiction. Yet, as I have pointed
 out, there is no adequate substitute and my colleagues
 appear to acknowledge this for they do not even attempt
 to suggest one.

This case does not in any sense present the courts with
 military usurpation of civilian power. The military tri-
 bunals exercise jurisdiction only to the extent and pre-
 cisely on the terms fixed by Congress and the Executive—
 both elected representatives of the people. Together the
 Legislative and Executive branches can, at will, modify,
 revoke or exercise broad and effective supervisory powers
 over the manner in which this jurisdiction is used. I em-
 phasize this because it points up the restraint and caution
 judges, and more especially this court, ought to exercise
 in setting aside the carefully considered joint action of the
 two coordinate branches of government exercising power
 thought by most reasonable men to have existed for over
 a century and a half.²⁹ We now strike down such

²⁷ See 352 U.S. 901 (1956); Justice Frankfurter concurring, 354 U.S. at 47-49; Supplemental Brief on Rehearing for Appellant, pp. 40-63; Supplemental Brief on rehearing for Appellee, pp. 137-59.

²⁸ 354 U.S. at 47-48.

²⁹ Not controlling, but interesting, is the universal recognition of the UCMJ as the most enlightened military code in history and as affording the basic elements of fairness. This is far from unbridled military power over civilians; it is bridled, harnessed, and hobbled—as it should be—by explicit congressional acts, and subject to the scrutiny of the United States Court of Military Appeals, composed of civilians, and other United States courts via habeas corpus.

96 action in reliance on the minority views of the Supreme Court with full awareness that there is no other feasible means of dealing with law enforcement concerning civilians at our foreign bases. *Reid v. Covert* has been called an invitation to murder, but as Mr. Justice Frankfurter suggested, Americans at overseas bases tend to commit relatively few murders. The majority opinion here is an invitation to larceny and every other one of the vast array of crimes within the reach of human ingenuity. We are left only with a qualified hope that these offenders may be subject to dismissal from "public service" if the offense can be established. I am unable to join in this kind of judicial negativism which strikes down sound, historically supported legal action and leaves a vacuum which cannot be filled.

97

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

No. 14,304

UNITED STATES OF AMERICA, EX REL DOMINIC GUAGLIARDO,
Appellant,

v.

NEIL H. McELROY, Secretary of Defense, Department of
Defense, et al., *Appellees.*

Appeal from the United States District Court for the
District of Columbia.

Before: Edgerton, Chief Judge, and Fahy and Burger,
Circuit Judges.

Judgment—September 12, 1958

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that

this cause be, and it is hereby, remanded to the District Court for further proceedings consistent with the opinion of this Court.

Dated: September 12, 1958.

Per Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge Burger.

98

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title Omitted)

Order—Supplementary Dissenting Opinion—November 10, 1958

Before: Burger, Circuit Judge.

The Clerk is hereby ordered and directed to add the following sentence at the end of footnote 3 (page 13) to my dissenting opinion in the above-entitled case:

The United States District Court of West Virginia, subsequent to the above opinion of the Court of Military Appeals, released Mrs. Dial on a writ of habeas corpus, declining to distinguish between capital and non-capital cases with respect to the constitutional power of Congress over wives of servicemen. United States ex rel. Singleton v. Kinsella, 164 F. Supp. 707 (S.D. W.Va. 1958).

Dated: November 10, 1958.

100

CLERK'S CERTIFICATE
(Omitted in Printing)

101

SUPREME COURT OF THE UNITED STATES

No. 570, October Term, 1958

(Title Omitted)

Order Allowing Certiorari—February 24, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 725

BRUCE WILSON, PETITIONER,

vs.

MAJOR GENERAL JOHN F. BOHLENDER,
COMMANDER, FITZSIMMONS ARMY HOSPITAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

INDEX

	Original	Print
Record from U.S.D.C., District of Colorado	1	1
Petition for writ of habeas corpus	1	1
Return of respondent to order to show cause	4	4
General Court-Martial Orders No. 16	6	6
Extract from Special Orders No. 77	8	9
General Court-Martial Orders No. 300	10	10
Extract from Special Orders No. 80	11	11
Extracts from Petitioner's Exhibit 1	12	12
Extract from Special Orders No. 36	13	12
General Court-Martial Orders No. 19	14	13
Extract from Special Order No. 147	16	16
Record of trial	18	17
Defense Exhibit "A"—Report of efficiency rating	41	40
Defense Exhibit "B"—Letter dated 25 January 1955 from Colonel J. A. Martin to "Dear Mr. Wilson" ..	43	41

	Original	Print
Defense Exhibit "C"—Letter dated August 2, 1955 from Colonel J. G. Black to Bruce Wilson	44	42
Defense Exhibit "D"—Stipulation of counsel	45	43
Defense Exhibit "E"—Stipulation of counsel	47	45
Appellate Exhibit 1—Argument and ruling on motion to dismiss for lack of jurisdiction	48	46
Opinion of the Court of Military Appeals in Bruce Wilson v. U. S.	53	53
Memorandum opinion and order, Arraj, J.	58	60
Notice of appeal	73	73
Order of the United States Court of Appeals for the Tenth Circuit docketing cause	74	74
Clerk's certificate	75	75
Order granting motion for leave to proceed in forma pauperis and petition for certiorari	76	76

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA EX REL

BRUCE WILSON, Fitzsimmons Army Hospital,
Denver, Colorado, *Petitioner*

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimmons Army Hospital, Denver, Colorado, *Respondent*

Petition for Writ of Habeas Corpus—Filed Aug. 20, 1958

The petition of Bruce Wilson shows:

1. The petitioner, Bruce Wilson, was born 54 years ago at Red Bluff, California, and at all times has been and still is a citizen of the United States. At all times relevant hereto, he was a civilian employed as an auditor of the Comptroller Division of the Army, Berlin Command, and not a member of the Armed Forces of the United States.

2. The petitioner is currently held, pursuant to military orders and by direction of military authorities at the Fitzsimmons Army Hospital, Denver, Colorado, and under the jurisdiction of the United States.

3. Heretofore, purporting to act under the authority of Article 2 (11) of the Uniform Code of Military Justice (50 USC sec. 522 (11)), the United States Army caused petitioner to be tried by a general court-martial of the U. S. Army convened at Berlin, Germany, on charges of sodomy and of conduct prejudicial to good order and discipline in the Armed Forces in violation of Articles 125 and 134 of the Uniform Code of Military Justice (50 USC sec. 719 and 728.)

4. Petitioner was so tried and on or about 21 August 1956 was sentenced to ten years at hard labor which the Convening Authority reduced to five (5) years.

5. Since on or about 21 August 1956, the petitioner has at all times been detained and confined under the jurisdic-

tion of the U. S. Army; for a period of time at the Usareur Stockade, Mannheim, Germany; Fort Jay, Governor's Island, New York; Branch-United States Disciplinary Barracks, New Cumberland, Pennsylvania; Valley Forge Army Hospital, Pennsylvania; and is presently confined at Fitzsimmons Army Hospital, Denver, Colorado.

6. Petitioner's arrest, detention and confinement by the United States military authorities has at all times been and still is unlawful and in violation of the Constitution of the United States. As an American citizen and a civilian, your petitioner could not be constitutionally tried by court-martial. Only a Court constituted under Article III of the Constitution, giving the safeguards of the Bill of Rights, especially Amendments V and VI, has jurisdiction to try him.

2 7. The persons exercising custody and restraint of petitioner are subordinate to, and under the direction of, respondent.

8. A petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of Columbia but was dismissed on grounds of lack of jurisdiction because the petitioner was not confined within the territorial limits of the District of Columbia. (Habeas Corpus #21-58).

WHEREFORE, petitioner prays that a Writ of Habeas Corpus be granted and issued, directed to respondent, commanding him to produce the body of petitioner before the Court at a time and place therein to be specified, then and there to receive and do what the Court shall order concerning the detention and restraint of petitioner, and that petitioner be ordered discharged from the detention and restraint aforesaid; and for such other relief as to the Court may seem just and proper.

ARTHUR JOHN KEEFFE
Arthur John Keeffe, Esq.
GEORGE P. NOUMAIR
George J. Noumair, Esq.

Attorneys for Petitioner

HOLLAND & HART

By JAY W. TRACEY, JR.
Jay W. Tracey, Jr.

Attorneys for Petitioner,
520 Equitable Building,
Denver 2, Colorado,
AMherst 6-1461.

United States of America }
District of Columbia } -ss
City of Washington }

Sworn to before me this 5th day of June, 1958.

BRUCE WILSON
Petitioner

MARY JO FREEHILL
Notary Public

(Seal)

My Commission expires Apr. 14, 1960.

STATE OF COLORADO }
COUNTY OF ADAMS }
FITZSIMONS ARMY HOSPITAL }

Sworn and subscribed to before me by BRUCE WILSON this
20th day of August, 1958.

GENELIA O'GARA
Notary Public

(Seal)

My Commission expires March 17, 1962.

3 STATE OF COLORADO }
COUNTY OF ADAMS } ss.
FITZSIMONS ARMY HOSPITAL }

I, BRUCE WILSON, being first duly sworn, say that I am the
Petitioner by whom the foregoing Petition is subscribed,
that I have read the same and that the facts set forth
therein are true to the best of my own knowledge and
belief.

BRUCE WILSON
Bruce Wilson

(Seal)

Notary Public

My Commission expires March 17, 1962.

4

(File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE UNITED STATES OF AMERICA, EX REL., BRUCE WILSON,
Petitioner.

•v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimons Army Hospital, Denver, Colorado,
Respondent.

**Return of Respondent to Order to Show Cause—
Filed Aug. 25, 1958**

COMES NOW the respondent in the above-entitled action, upon whom has been served an order to show cause why a writ of habeas corpus should not issue for the production of the petitioner, and by his attorney, JOHN S. PFEIFFER, Assistant United States Attorney for the District of Colorado, making return to the said order, respectfully shows unto the court that he holds the said petitioner by authority of the United States as a prisoner in the custody of the Department of the Army, pursuant to a sentence of a General Court-Martial under the following circumstances:

1. That said petitioner was serving with, employed by and accompanying the Armed Forces without the continental limits of the United States during the years 1955 and 1956.

2. That on August 21, 1956, said petitioner was charged and convicted of three acts of sodomy, in violation of Article 125, Uniform Code of Military Justice, 50 USC, Section 719; that he was further convicted of two charges of lewd and lascivious acts with persons under the age of

sixteen, in violation of Article 134, Uniform Code of Military Justice, 50 USC, Section 728; that he was further convicted of two charges of displaying lewd and filthy pictures to minors with intent to arouse their sexual desires, in violation of Article 134, Uniform Code of Military Justice, 50 USC, Section 728; that the General Court Martial sentenced the petitioner to confinement at hard labor for a period of ten years; that on August 23, 1956, the convening authority approved the conviction and reduced the sentence to five years at hard labor and directed that the petitioner be confined to the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, pursuant to General Court Martial Order No. 16, Headquarters, Berlin Command, U. S. Army, a copy of which is hereto appended.

3. That the conviction was affirmed by the United States Court of Military Appeals on March 28, 1958—*United States v. Wilson*, 8, USMA 60, 25 CMR 322.

4. That on April 18, 1958, the petitioner was transported to Fitzsimons Army Hospital for purposes of hospitalization and treatment, pursuant to Special Order No. 77, a copy of which is hereto appended.

WHEREFORE, for the reasons hereinabove set forth, the respondent respectfully prays that the court discharge the order to show cause and dismiss the petition for said writ of habeas corpus.

JOHN S. PFEIFFER,
John S. Pfeiffer,
*Assistant United States Attorney
for the District of Colorado
Attorney for Respondent.*

JSP:fsm

General Court-Martial
Order Number 16

Headquarters
Berlin Command
APO 742, US Army
23 August 1956

Before a General Court-Martial which convened at Berlin, Germany, pursuant to paragraph 1, Special Orders Nr 147, this headquarters, dated 26 June 1956, was arraigned and tried:

GS-11 Bruce Wilson, Department of the Army civilian employee.

CHARGE I: Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of December 1955, commit a lewd and lascivious act with Joseph R. Szocinski, a male under sixteen years of age, by placing Joseph R. Szocinski's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of March or April 1956, commit a lewd and lascivious act with Charles F. Messer, Jr., a male under sixteen years of age, by placing Charles F. Messer, Jr's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 125

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in

Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private First Class Samuel W. Sloan.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of May 1956, commit sodomy with Private First Class William C. Frederick.

Specification 3: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private-2 Marvin W. Warnack.

ADDITIONAL CHARGE: Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 21 April 1956 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Robert C. Vick, a minor, with the intent of arousing the passions and sexual desires of the said Robert C. Vick.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 1 December 1955 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Ashton L. Norton, a minor, with the intent of arousing the passions and sexual desires of the said Ashton L. Norton.

7

PLEAS

To all Specifications and Charges: Guilty

FINDINGS

Of all the specifications and Charges: Guilty

SENTENCE

To be confined at hard labor for ten years. (No previous convictions considered.)

The sentence was adjudged on 21 August 1956.

ACTION

HEADQUARTERS

BERLIN COMMAND

(7781)

Office of the Commanding General

APO 742 US ARMY

23 August 1956

In the foregoing case of Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, only so much of the sentence as provides for confinement at hard labor for five years is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. A United States penitentiary, reformatory, or other such institution is designated as the place of confinement. However, the prisoner will be temporarily confined in the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, pending the designation of a Federal institution by the Attorney General. At such time, the prisoner will be committed to the designated Federal institution and the confinement served therein, or elsewhere as competent authority may direct.

s/ HUGH P. HARRIS

t/ Hugh P. Harris

Major General, USA

Commanding

For the Commander:

O. M. BARSANTI

Colonel, GS

Chief of Staff

Official:

E. M. GILROY

E. M. Gilroy

Lt. Col, AGC

Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks,
New Cumberland, Pa.
- 6—CinC, USAREUR. (Attn: Mil Justice Sec. JA Div),
APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742,
US Army
- 2—AG Records, Berlin Command (7781), APO 742, US
Army
- 3—AG Pers, Berlin Command (7781), APO 742, US
Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742,
US Army
- 1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US
Army
- 1—Conf Officer, Berlin Command Prov Guardhouse,
APO 742, US Army
- 5—CO, USAREUR Military Prison, APO 166, US
Army
- 1—Bruce Wilson, GS 11 Dept of the Army Civ. Berlin
Command Prov Guardhouse, APO 742, US Army

8 Extract from Special Orders No. 77

For immediate delivery

NOTE: For explanation of symbols and abbreviations see
AR 320-50 w/C2.

HEADQUARTERS
VALLEY FORGE ARMY HOSPITAL
Phoenixville, Pennsylvania

EXTRACT

18 April 1958

Special Orders
Number 77

* * * * *

9 13. Par. 10 SO 75 this Hq'es pert to trf of BRUCE
WILSON (former DAC, non-military prisoner of the
Department of the Army) (AGO#A 40793) to Fitzsimons
AH Denver, Colo is amended to add: "*for further obsn.
trmt & dispo thereat.*" AUTH: ASMRO 19871 dtd 14
Apr 58.

* * * * *
For the Commander:

R. F. SCHALLER
Major, MSC
Adjutant

Official:

LEO A. GODLEWSKI
Leo A. Godlewski
CWO, W-2, USA
Asst Adjutant

Distribution: AA,BB,CC,DD,EE,GG,
Special Distribution: Ref par 8-1 cy Off Tng Br
Ref par 7-10 cy Sfe Bennett (del CO MHD)

10

General Court-Martial Orders No. 300

HEADQUARTERS

BRANCH UNITED STATES DISCIPLINARY BARRACKS
New Cumberland, Pennsylvania

General Court-Martial
Order Number 300

8 May 1958

In the general court-martial case of GS-11 BRUCE
WILSON, Branch United States Disciplinary Barracks, New
Cumberland, Pennsylvania (formerly a Department of the
Army Civilian employee), the sentence, as approved by
the convening authority, to confinement at hard labor for
five (5) years, adjudged 21 August 1956, as promulgated
in General Court-Martial Order Number 16, Headquarters,
Berlin Command (7781), APO 742, U. S. Army, dated 23
August 1956, has been affirmed pursuant to Article 66 and
67. The provisions of Article 71c having been complied
with, the sentence will be duly executed. A United States
Penitentiary, reformatory, or other such institution is

designated as the place of confinement. However, the prisoner will be temporarily confined in the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, in accordance with the provisions of Paragraph 4b (4), AR 633-5, or elsewhere as competent authority may direct.

By Order of COLONEL SALLEE:

Official:

WALTER F. JUNKINS
Captain, MPC
Adjutant

G. S. BREWER
CWO, W-2 USA
Asst Adjutant
(CM 392423)

Distribution:
(Par 9f, GAR 22-10)

Signature
Date Noted

11

Extract from Special Orders No. 80

HEADQUARTERS

BRANCH UNITED STATES DISCIPLINARY BARRACKS
New Cumberland, Pennsylvania

Special Orders
Number 80

8 May 1958

EXTRACT

2. The design place of conf in case of Prisoner BRUCE WILSON, RN25818 (DA Civ), presently abs sk Fitzsimmons Army Hosp Denver, Colo., is changed from Br USDB, New Cumberland, Pa to Br USDB, Lompoc, Cal off 12 May 58. AUTH: AR 633-5 and Msg PHGK-S, PHG DA dtd 5 May 58.

For the Commandant:

WALTER F. JUNKINS
Captain, MPC
Adjutant

Official:

G. S. BREWER
CWO, W-2 USA
Asst Adjutant

12

Petitioner's Exhibit 1
Accused's Copy

13

Extract from Special Orders No. 36

HEADQUARTERS

HEADQUARTERS AREA COMMAND

**United States Army Garrison, Headquarters Area,
Germany APO 333, US Army**

**Special Orders
Number 36**

18 February 1958

EXTRACT

1. PAC MCM 1951, par 97d, Ltr JAGJ 1954/4164, 20 Apr 1954 and in conformance with par 4b, AR 618-95, 22 Oct 1957, in the General Court Martial case of GS-11 Bruce Wilson, Department of the Army Civilian employee promulgated in GCMO Number 16, 23 Aug 1956, Headquarters Berlin Command, APO 742 and corrected by GCMO Number 19, 30 Aug 1956, Headquarters Berlin Command, APO 742, the previously designated temporary place of confinement, namely USAREUR Stockade, Mannheim, Germany, is changed and the prisoner will be confined in the US Disciplinary Barracks, New Cumberland, Pennsylvania or elsewhere as competent authority may direct, pending completion of appellate review.

For the Commander:

JAMES A. PARKER
Major, AGC
Adjutant

Official:

C. R. LUCAS
C. R. Lucas
Major, Arty
Asst. Adjutant

Distribution:

- 1—TAG, DA, Wash 25, D.C., Attn: AGPF
- 2—TPMG, DA Wash 25, D.C.
- 25—JA Div HACOM (Includes 10 cys for TJAG, DA Wash 25, DC)

- 1—Bruce Wilson, USAREUR Stockade, APO 166, US Army
- 25—Confinement Officer, USAREUR Stockade, APO 166, US Army
- 1—JA Div. Hq. USAREUR, APO 403, US Army
- 1—HACOM Fin & Acctg Office, APO 333, US Army
- 5—CG, Berlin Command, APO 742, US Army, Attn: SJA
- 2—Central Files, HACOM
- 2—Central Finance & Acctg Office, USAREUR, APO 403, US Army
- 2—HACOM Civilian Personnel Division

14 General Court-Martial Orders No. 19

Corrected Copy
General Court-Martial
Order Number 19

Headquarters
Berlin Command (7781)
APO 742, US Army
30 August 1956

In the general court-martial case of GS-11 Bruce Wilson, Department of the Army civilian employee, promulgated in General Court-Martial Order Nr. 16, this headquarters, dated 23 August 1956, the place of confinement designated as a United States penitentiary, reformatory, or other such institution, is redesignated as the *United States Army, Europe, Stockade, Mannheim, Germany*, pending completion of appellate review.

For the Commander:

(SEAL)

O. M. BARSANTI
Colonel, GS
Chief of Staff

Official:

E. M. GILROY
E. M. Gilroy
Lt Col, AGC
Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks, New Cumberland, Pa.
- 6—CinC, USAREUR (Attn: Mil Justice Sec, JA Div), APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742, US Army
- 2—AG Records, Berlin Command (7781), APO 742, US Army
- 3—AG Pers, Berlin Command (7781), APO 742, US Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742, US Army
- 1—Lt Col F X Bradley, 6th Inf Regt, APO 742, US Army
- 1—Confinement Officer, Berlin Command Provisional Guardhouse, APO 742, US Army
- 5—CO, USAREUR Stockade, APO 166, US Army
- 1—Bruce Wilson, GS-11 Dept of the Army Civ, USAREUR Stockade, APO 166, US Army

15

General Court-Martial Orders No. 19

General Court-Martial

Order Number 19

Headquarters
 Berlin Command (7781)
 APO 742, US Army
 30 August 1956

In the general court-martial case of GS-11 Bruce Wilson, Department of the Army civilian employee, promulgated in General Court-Martial Order Nr. 16, this headquarters, dated 23 August 1956, the place of confinement designated as a United States penitentiary, reformatory, or other such institution, is redesignated as the Branch

United States Disciplinary Barracks, New Cumberland,
Pennsylvania, pending completion of appellate review.

For the Commander:

(SEAL)

O. M. BARSANTI
Colonel, GS
Chief of Staff

Official:

E. M. GILROY
E. M. Gilroy
Lt Col, AGC
Adjutant General

Distribution:

- 5—TAG, Dept of the Army, Wash 25, DC (Attn: AGPF)
- 1—CO, Branch United States Disciplinary Barracks,
New Cumberland, Pa.
- 6—CinC, USAREUR (Attn: Mil Justice Sec, JA Div),
APO 403, US Army
- 1—CG, Berlin Command (7781), APO 742, US Army
- 30—SJA, Berlin Command (7781), APO 742, US Army
- 1—Finance Officer, Berlin Command (7781), APO 742,
US Army
- 2—AG Records, Berlin Command (7781), APO 742, US
Army
- 3—AG Pers, Berlin Command (7781), APO 742, US
Army
- 1—PM, Berlin Command (7781), APO 742, US Army
- 1—The Comptroller, Berlin Command (7781), APO 742,
US Army
- 1—Lt Col F. X. Bradley, 6th Inf Regt, APO 742, US
Army
- 1—Conf Officer, Berlin Command Prov Guardhouse,
APO 742, US Army
- 5—CO, USAREUR Military Prison, APO 166, US
Army
- 1—Bruce Wilson, GS-11 Dept of the Army Civ,
USAREUR Military Prison, APO 166, US Army

16

16

Extract from Special Orders No. 147

Proceedings of a General Court-Martial which met (at) Berlin, Germany, at 0935 hours, 21 August 1956, pursuant to the following orders:

HEADQUARTERS
BERLIN COMMAND
(7781)
APO 742 US Army

Special Orders
Number 147

26 June 1956

EXTRACT

1. Pursuant to authority contained in Section I, General Orders 102 Department of the Army, 21 Nov 52, a general court-martial is hereby ordered to convene at Berlin, Germany, at 0800 hours on 27 Jun 56, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it. The court will be constituted as follows:

* * * * *

For the Commander:

(SEAL)

J. M. WILLIAMSON
Colonel, GS
Act Chief of Staff

Official:

E. M. GILROY
Lt Col, AGC
Adjutant General

17 Para 1, SO 147, Hq Berlin Command (7781)

Distr:

25—SJA Div

1—Ea Member

1—CO, Hq & Hq Co Berlin Sta Com (7781)

1—CO, Sig Co Berlin Sta Com (7781)

1—CO, Svc Co Berlin Sta Com (7781)

5—CO, 279 Sta Hosp

10—CO, 6th Inf Regt

30—AG (10—Mil Pers

20—Orders)

PERSONS PRESENT

Maj Paul G. Tobin
 Lt Col Francis X. Bradley
 Lt Col Horace L. Jennerson
 Lt Col Robert O. English
 Lt Col Thomas J. Cleary, Jr.
 Lt Col Theodore Kafter
 Lt Col Louis R. Buckner
 Maj Harold L. Ramsey
 1st Lt Zane E. Finkelstein
 Capt Melburn N. Washburn

PERSONS ABSENT

Maj Hasty W. Riddle
 Maj Edward J. Maltese
 1st Lt Raymond Lesinski
 2d Lt Robert H. Daine
 1st Lt Aldon L. Carson
 1st Lt John E. Day, Jr.

The following named accused was present:

BRUCE WILSON, AGO A-407 943, GS-11, Department
 of the Army Civilian, Comptroller Division, Berlin
 Command (7781)

The appointed reporter, Jean P. Webb was sworn.

19 TC: The legal qualifications of all members of the prosecution are correctly stated in the appointing orders.

No member of the prosecution named in the appointing orders has acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

By whom will the accused be defended?

DC: The accused will be defended by Captain Washburn as associate counsel; he expressly consents to the absence of Lieutenants Carson and Day; and introduces as individual counsel Dr. Arthur Brandt who is a member of

the Bar of the State of Massachusetts and the Federal Bar of New York.

TC: Will counsel representing the accused state whether the legal qualifications of the appointed members of the defense are other than as stated in the appointing orders and will individual counsel state whether he has been certified as counsel by an appropriate Judge Advocate General?

DC: The qualifications of appointed members of the defense are correctly stated and the individual counsel is not certified.

TC: Has any member of the defense, including individual counsel, acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case?

DC: No member has so acted.

LO: It appears that counsel for both sides have the requisite qualifications.

Proceed to convene the court.

TC: The court will be sworn.

The members of the court, the law officer, and the personnel of the prosecution and defense were sworn.

LO: The court is now convened.

TC: The general nature of the charges in this case is two specifications of lewd and lascivious acts with males under sixteen years of age and three acts of sodomy with enlisted men in the Berlin Garrison, in violation of Articles 134 and 125 respectively; and of the Additional Charge two specifications of displaying lewd and obscene photographs to two different minors, with intent to arouse the passion of the minors, in violation of Article 134 of the

Uniform Code of Military Justice. The charges
20 were preferred by Lieutenant Colonel Hammonds, and the additional charge was preferred by Chief Warrant Officer William J. Autry; forwarded with recommendations as to disposition by Lieutenant Colonel Quinlan; and investigated by Major Bell. Neither the law officer nor any member of the court will be a witness for the prosecution.

The records of this case disclose no grounds for challenge.

If any member of the court or the law officer is aware of any facts which he believes may be a ground for challenge

by either side against him, he should now state such facts.

LO: Apparently there are none.

TC: The prosecution has no challenges for cause and the prosecutive has no peremptory challenge.

Does the accused desire to challenge any member of the court or the law officer for cause?

DC: He does not.

TC: Does the accused wish to exercise his right to one peremptory challenge against any member?

DC: He does not.

21 CHARGE I. Violation of the Uniform Code of Military Justice, Article 134

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of December 1955, commit a lewd and lascivious act with Joseph R. Szocinski, a male under sixteen years of age, by placing Joseph R. Szocinski's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of March or April 1956, commit a lewd and lascivious act with Charles F. Messer, Jr., a male under sixteen years of age, by placing Charles F. Messer, Jr's penis in his mouth, with intent to gratify the sexual desires of the said Bruce Wilson.

CHARGE II. Violation of the Uniform Code of Military Justice, Article 125

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private First Class Samuel W. Sloan.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces

without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, during the month of May 1956, commit sodomy with Private First Class William C. Frederick.

Specification 3: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin Germany, did, at Berlin, Germany, during the month of June 1956, commit sodomy with Private-2 Marvin W. Warnack.

22 Typed Signature of Accuser—Vernon Hammonds
 Rank—Lt Col, MPC
 Organization—Provost Marshal Berlin Command (7781)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 25 day of June, 1956, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

E F Starr
 (Type signature)

*Officer administering oath must
 be a commissioned officer.*

Major, AGC, Adjutant General
 Division Berlin Command (7781)
 (Rank and organization of
 officer administering oath)

Assistant Adjutant General
 (Official character, as Adjutant,
 Summary Court, etc. See para-
 graph 29e, MCM, 1951, and
 articles 30a and 136.)

1st INDORSEMENT

Headquarters Berlin Command (7781)

(Designation of command of convening authority)

Berlin, German

(Place)

3 July 1956

(Date)

Referred for trial to the general court-martial appointed by paragraph 1, Special Orders No. 147, Headquarters Berlin Command, 26 June 1956, subject to the following instructions: To be tried with the additional charges, dated 27 June 1956

For the Commander:

(Command or order)

FRANCIS HUME

Capt, AGC Asst Adj Gen

(Typed signature, rank, and official capacity of officer signing)

23 Additional Charge: Violation of the Uniform Code of Military Justice 434

Specification 1: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 21 April 1956 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Robert C. Vick, a minor, with the intent of arousing the passions and sexual desires of the said Robert C. Vick.

Specification 2: In that Bruce Wilson, a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany, did, at Berlin, Germany, from on or about 1 December 1955 to on or about 20 June 1956, wrongfully and unlawfully show obscene, lewd and filthy pictures and photographs to Ashton L. Norton, a minor, with

the intent of arousing the passions and sexual desires of the said Ashton L. Norton.

24 Typed Signature of Accuser—William J. Autry
 Rank—CWO

Organization—11th MP Det (C1)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 27 day of June, 1956, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

E F Starr

(Typed signature)

*Officer administering oath must
 be a commissioned officer.*

E. F. STARR,

Major, Hq Berlin Command

(Rank and organization of officer
 administering oath)

Assistant Adjutant General

(Official character, as Adjutant,
 Summary Court, etc. See para-
 graph 29a, MCM, 1951, and
 articles 30a and 136.)

1st INDORSEMENT

Headquarters Berlin Command (7781)

(Designation of command of convening authority)

Berlin, Germany

(Place)

3 July 1956

(date)

Referred for trial to the general court-martial appointed by Special Orders No. 147, Headquarters Berlin Command, 26 June 1956, subject to the following instructions: To be tried with the original charges, dated 25 June 1956.

For the Commander:

(Command or order)

FRANCIS HUME,

Capt, AGC Asst Adj Gen

(Typed signature, rank,
and official capacity of officer
signing)

25 TC: With the consent of the accused I shall omit the reading of the charges, a copy of which is before each member of the court, the law officer, and the accused. The charges are signed by Lieutenant Colonel Hammonds and the additional charge is signed by Chief Warrant Officer William J. Autry, persons subject to the code, as accusers; are properly sworn to before an officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by Major General Harris, the convening authority. The charges and specifications and the additional charge and its specifications, the names and descriptions of the accusers, their affidavits, and the reference for trial will be copied verbatim into the record.

DC: The accused consents.

LO: The reading of the charges may be omitted. The charges and the additional charge were served on the accused by me on 3 July 1956.

Mr. Wilson, how do you plead?

Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

DC: Before entering a plea the defense requests a hearing with the law officer outside the hearing of the court.

LO: Without asking the nature of the request or the reason for the request—

IDC: The objection will be lack of jurisdiction.

LO: With the indulgence of the court I will hear, in the absence of the court, your arguments.

President: The court will be closed.

The court recessed at 0945 hours, 21 August 1956.

The court opened at 1020 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record reflect that all parties to the proceedings who were present at the time the court recessed are again present in court.

LO: Proceed.

TC: Mr. Wilson, do you have other motions to make?

DC: He does not.

26 TC: Mr. Wilson, how do you plead?

IDC: On behalf of the accused the defense wishes to enter a plea of guilty as charged.

LO: Mr. Wilson, you have pleaded guilty to all Specifications and Charges. By so doing, you have admitted every act and every element of the offenses charged. Your plea subjects you to a finding of guilty without further proof of the offenses charged, and in that event you may be sentenced by the court to the maximum punishment authorized for the offenses. You are legally entitled to plead not guilty and place the burden on the prosecution of proving your guilt of the offenses. Your plea will not be accepted unless you understand the meaning and effect of that plea. Do you understand what I am talking about?

Accused: Yes sir.

LO: And understanding this, do you persist in your plea of guilty?

Accused: Yes sir.

TC: The prosecution has no legal authorities to present to the court.

Does the defense desire to present legal authorities at this time?

DC: The defense does not.

TC: Prosecution has no opening statement and in light of the plea of the accused the prosecution will present no evidence.

The prosecution rests.

DC: The defense has no opening statement.

The accused has been advised of his right to testify on the merits of the case and has elected to remain silent. Would the law officer care to further advise him?

LO: Yes, I would like to advise the accused of his testimonial rights on the merits.

Mr. Wilson, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses, and you may be cross-examined on your testimony by the trial counsel and the court. If your

27 testimony should concern less than all of the offenses charged against you and you do not desire to or do not testify concerning the others, then you may be questioned about the whole subject of the offenses concerning which you do testify but you will not be questioned about any offenses concerning which you do not testify.

Secondly, you may, if you wish, elect to remain silent, that is say nothing at all. If you do this, and you may if you wish, the fact that you do not take the witness stand will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented upon by the trial counsel when addressing the court.

Do you understand what I have said?

Accused: Yes sir.

LO: All right then, I want you to again talk over your decision with your counsel and then tell the court what you desire to do.

Accused: Sir, I wish to remain silent.

LO: All right.

DC: Defense rests.

TC: The prosecution has no farther evidence to offer. Does the defense have any further evidence to offer?

DC: The defense has nothing further.

LO: Mr. Wilson's plea subjects him to a finding of guilty without further proof. With your permission the court will be closed.

President: Does any member of the court have any requests for further instructions from the law officer?

Lt. Col. Cleary: I would like to ask a question.

LO: Yes sir.

Lt. Col. Cleary: Is it our duty now to rule upon a plea of guilty or not guilty despite the acceptance?

LO: That is correct, sir. You must find—you close and vote on your findings of guilty or not guilty.

President: Any other questions?

The court will be closed.

28 The court closed at 1025 hours, 21 August 1956.

The court opened at 1035 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record reflect that all parties to the proceedings who were present at the time the court closed are again present in court.

President: Bruce Wilson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of all the Specifications and Charges: Guilty

LO: The court will now hear the personal data concerning the accused shown on the charge sheet, and will receive evidence of previous convictions, if any.

TC: Page 1 of the charge sheet discloses the following information concerning the accused:

Place: Berlin Germany Date: 25 June 1956

Accused: Wilson, Bruce (NMI)

Service Number: AGO A-407 943

Grade: GS 11, Department of the Army Civilian

Organization and Armed Force: Comptroller Division
Berlin Command (7781)

(employed by Department of the Army)

Date of Birth: 18 March 1904

Contribution to Family or Quarters Allowance: N/A

Pay Per Annum: Basic—\$6,820.00; Sea or Foreign Duty—

Total—\$6,820.00

Record of Service

Initial Date of Current Service: N/A

Term of Current Service:—

Prior Service: Employed as Department of the Army
Civilian 9 years, 5 months.

Data As To Restraint

Nature of any Restraint of Accused: Confinement

Date: 22 June 1956

Location: Confinement Ward, US Army Hospital, Berlin,
Germany

TC: Are the data as read correct?

DC: They are.

TC: Prosecution has no evidence of previous convictions.

29 LO: Mr. Wilson, you are advised that you may now present evidence in extenuation or mitigation of the offenses of which you stand convicted. You may, if you wish, testify under oath as to such matters, or remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offenses of which you stand convicted. This unsworn statement is not evidence and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself or it may be made by your counsel, or both of you. Consult with your counsel now and advise the court as to your desire.

Accused: Sir, I wish to remain silent. My counsel will present the matter for me.

LO: All right.

IDC: With the permission of the court I would like to submit in evidence three documents which will be marked Defense Exhibits A, B, and C.

LO: Do you wish to introduce all of these at one time or one at a time?

IDC: Is there any objection if I read the last one first?

LO: One moment, please, Doctor. Will you please present them to the reporter and have her mark them and then pass them to me?

IDC: O.K. Fine. They are A, B, C.

LO: Will you mark this Defense Exhibit A for Identification?

The document referred to was marked Defense Exhibit A for Identification.

LO: And this one Defense Exhibit B for Identification?

The document referred to was marked Defense Exhibit B for Identification.

LO: And Defense Exhibit C for Identification.

The document referred to was marked Defense Exhibit C for Identification.

LO: Does the prosecution have any objection to these Exhibits?

TC: No objection.

30 LO: Defense Exhibits A, B, and C for Identification will be received in evidence as Defense Exhibit A, Defense Exhibit B, and Defense Exhibit C, respectively.

The documents marked Defense Exhibit A for Identification, Defense Exhibit B for Identification, and Defense Exhibit C for Identification, were admitted in evidence and marked Defense Exhibit A, Defense Exhibit B, and Defense Exhibit C, respectively.

LO: You may now read them.

Individual counsel read Defense Exhibits A, B, and C to the court.

DC: Will the reporter mark these documents Defense Exhibits D and E for Identification?

The documents referred to were marked Defense Exhibit D for Identification and Defense Exhibit E for Identification.

DC: Defense Exhibit D for Identification which is the stipulated testimony of Dr. Werner Jaffe, and Defense Exhibit E for Identification which is the stipulated testimony of Captain H. M. Bertram, are offered in evidence as Defense Exhibit D and Defense Exhibit E.

TC: No objection.

LO: Mr. Wilson, I have here two documents headed "Stipulation", upon which there are the signatures of your counsel, the trial counsel, and one purporting to be your own. You don't have to consent to any stipulation and if you do not care to consent then we must bring in

proof of the things stipulated to. Knowing this, do you agree to these stipulations?

Accused: I have no objection to the stipulation, sir.

LO: Do you enter into the stipulations of your own free will?

Accused: Yes sir.

LO: Defense Exhibits D and E for Identification will be received in evidence as Defense Exhibits D and E.

The documents marked Defense Exhibit D for Identification and Defense Exhibit E for Identification were admitted in evidence and marked Defense Exhibit D and Defense Exhibit E, respectively.

DC: Have I permission to read them to the court, sir?

LO: You have.

Defense counsel read Defense Exhibit D and Defense Exhibit E to the court.

31 DC: Defense requests a five minute recess.

President: The court will recess for five minutes.

The court recessed at 1050 hours, 21 August 1956.

The court opened at 1055 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record indicate that all parties to the proceedings who were present at the time the court recessed are again present in court.

LO: Proceed.

IDC: With the permission of the court I would like now, on behalf of the accused, to present to the court those factors which the defense considers important with regard to the problem of extenuating and mitigating circumstances. After the accused has pleaded guilty as specified it is now our duty to find which sentence he should have, how the punishment should be, and in fulfilling this duty we shall have to consider everything as far as this trial was able to disclose, those factors which are in his favor but naturally also those which are to his disadvantage.

The accused is a man of fifty-two years of age. No doubt he has been in the employment of the Army for many years. No doubt—I think I can say that here although the discussion of the problem of jurisdiction has taken place in a closed-session but nevertheless I think I am allowed to say that the accused voluntarily has resigned his position with the Army effective yesterday. He did

so because he felt that in view of the very grave charges brought against him he does not want to be a burden to the Army any more, and he does not want, whatever the outcome of this trial, to be a disgrace to the Army. I need not discuss at this time the legal repercussions of such resignation but I might say that I consider this a good gesture on the part of my client. It shows that he has not lost his sense of responsibility and it shows also that he does want to do everything he can to bring this trial to an end whereby no unnecessary examinations will take place and whereby finally, according to the offenses and in consideration of the factors which are in his favor, the sentence will be meted out.

There are factors which, in my opinion, are strongly in favor of the accused. His background and his past work have been considered by his superiors as of excellent character. This is the first time that this man of fifty-two years of age has ever been charged in any court with any offense. Having been retained as a civilian counsel I felt from the beginning and more and more of my working for him as an attorney I could not help feeling a strong sense of sympathy. I realized soon that the kind of offenses he has been charged with were not caused by a criminal disposition, have not been caused by a lack of responsibility towards society, I realized too that here a man, for certain reasons which were beyond his control, had been committing certain acts in the sexual field which are no doubt forbidden under the law but, nevertheless, deserve some human understanding. He was not a man who has committed any act, even in his capacity as an employee of the Army, that could be considered a disgrace to the Army; there was no act of violence; there was nothing which so often and unfortunately we are facing in these days and which form the background of a trial, it was strictly in the field of abnormal sexual relations that these offenses should have been and under his plea of guilty had been committed by the accused. The penalties, the maximum penalties under the law are very harsh. I do not think personally, and I may be allowed to say this as a civilian attorney, I do not think that they actually are in conformity with the measure of criminality, with the criminal intent which is al-

ways inherent in these kinds of cases. I may be allowed to say that we know that actually these things take place much more often, much more frequently, than society may be apt to admit, and we must say in all honesty and frankly that if all the cases of homosexual behavior which are really taking place would be tried in court, I do not think that the time of the court will be sufficient to have all these cases tried and brought to them.

In this particular case the accused is being charged with some offenses with men and some with young men. He admits these charges. I would like to mention here that not one of the persons concerned has ever brought any charge against him; they would not have complained at all; it was just due to the fact that everything which has taken place in the apartment there of the accused was a matter of voluntary acting, never of force, never of using any bad means, but it was actually a matter of voluntarily subjecting to these kinds of offenses. I tried, doing my duty as defense counsel with the able cooperation of Captain Washburn, we tried to find out naturally how this all came about, and I can only say that here is a man standing before you who never had any love in life, who never experienced any warm affection as most of us do, he never was married, he never had actually a loving woman, and, finally, after certain experiences he found himself in the Maritime Service and as it so happens, being on the high seas for many, many months, he experienced a kind of a love with a man, an officer on his ship, and there it happened into the life of a man so far apparently normal brought suddenly in a new experience, a kind of a friendship of intimate character with another man. You see suddenly a man who not only entertained—had the thought but also homosexual inclinations—a fact which will explain and can only explain the present course his life has taken. As I said before this man unfortunately never had any real love and finally he turned to the only man who could, in a way, give him some kind or some substitute of love. It explains also his whole way, it explains his kind of affection. It is true what the psychiatrist said about him—it is absolutely true that this man when he talks of any kind of love in his life he only

33 meant the three dogs and never a human being; no

woman was ever able to give him a kind of love and not even the men he had connections with were able to do so as we sometimes find in life. The dogs—two of them died recently and only one is left—meant everything to him and I was amazed at the affection this man suddenly was able to show when he talked about the animals but never when he talked about human beings of both sexes. I think instead of trying to analyze his life and to analyze the career which finally led to these offenses, instead of trying to do this I can simply mention the fact that both psychiatrists, Doctor Jaffe and Captain Bertram, concurred in the opinion that here is not only a man who is to be considered a psychotic character, a man of strong psychopathic traits, but definitely to be considered a psychopathic personality who is on the borderline of schizophrenia. Well now, Mr. President and members of the court, we are not psychiatrists, we can only take on the face of it what the psychiatrist tells us. The word "borderline" may cause the impression that here is a man who may be insane. The defense has definitely refrained from raising this issue; we are of the opinion that our client is sane in the legal sense which does not mean, however, that there are grave doubts about the strong degree of mental incapacity, as you have to call these borderline cases. We cannot exactly determine the degree in percentage but we have to assume that both psychiatrists having examined the accused for several times and having him subjected even to a so-called electroencephalogram test—to a real brain test, if they concur in the opinion that this man is to be considered on the borderline between mental incapacity and capacity we know something at least. Assuming that he is legally sane, which I do not doubt a moment, still the degree having brought him to the borderline of schizophrenia, the degree to which he is to be considered mentally inferioritated, mentally incapacitated, seems to me a very high one. I, therefore, consider the opinion of the psychiatrists as the most important one, and I ask you to kindly consider this opinion as an essential factor in determining to which extent he deserves extenuating and mitigating circumstances.

I wish to say finally that the kind of sentence which we

are going to fix today should, after all, consider his background: it should consider that the man for the first time in his life, due to certain surroundings, due perhaps to alcoholic influence, due most of all to his lack of inhibitions and his inferiority in a mental way being a borderline case of schizophrenia, that he does not deserve a harsh sentence. Let us not forget that our sentence should not eliminate this man from society, that the sentence should not destroy him for life, but should, if the sentence is just and fulfills the purpose it should serve, it should help that this man regain his place in society and serve again and perhaps in a better way his country.

Thank you.

DC: If I may—just a moment, please. If it please the court, I would like to say a few words about the mechanics of your sentence in this case. I would first, however, 34 like to point out something which Doctor Brandt, I believe, did not, and probably Doctor Jaffe through modesty would not. I don't know whether the court is familiar with this name "Jaffe" or not. Doctor Jaffe, however, is a world recognized authority in his field and, of course, there is no contest as to the psychiatric testimony here since both psychiatrists are in agreement.

My portion of this thing goes strictly to the mechanics of your sentence. You gentlemen, of course, have all had experience on courts-martial and you are aware that a common feature of a sentence in a court-martial case is a forfeiture. Generally with an accused soldier who is sentenced to a discharge, a punitive discharge, the sentence includes total forfeitures although it does not necessarily include forfeitures, they are not mandatory. Now since I know Major Tobin is a competent and conscientious law officer I am sure he will instruct you on this subject. Mr. Wilson, being a civilian, is not subject to forfeitures; he is, however, subject to be sentenced to a fine and I am sure the law officer will distinguish between those for you. Primarily the distinction is that a forfeiture means that a man loses pay which would accrue to him in the future; you are all no doubt aware that you cannot forfeit any pay of a soldier which has already accrued to him. A fine, on the other hand, must be paid by an individual out of his own pocket without regard to past or future pay. Now,

as a practical matter, when you sentence a soldier to a forfeiture the forfeiture ordinarily becomes effective on the date the convening authority takes action on the case, and the practical effect of it is simply that while the man is in confinement, awaiting discharge, he doesn't get paid; that's what it amounts to. Mr. Wilson isn't going to get paid any way, his pay is effectively cut off; so, even though your sentence should not include a fine he will be in the same position that a soldier would under like circumstances; he will not be receiving any income. I simply wanted to point this out to the court so that we could arrive at complete justice in the case. I do not feel that Mr. Wilson should be more severely punished than a soldier would be under like circumstances.

TC: If the court please, a few of what I consider important points. First, the psychiatric test. Gentlemen, let's realize that a man doesn't do the things Mr. Wilson did if he is a completely normal person; a man doesn't commit these acts without personality quirks. Psychiatrists have a nice funny name, a long one, one I can't even pronounce, for personality quirks which causes this sort of thing. A normal human being doesn't do these things, normaley, of course, being a relative term, a question of degree; so all we have is the psychiatrist telling us in a very nice way that the man has a personality quirk.

This sentence, Gentlemen, the law requires to be legal, appropriate, and adequate. There are several things that should be considered: (a) The possible perversion of these children; (b) We must set an example for the Command, for the children, that such conduct is of such a dangerous nature that we can effectively preclude its recurrence. We

35 must impress these children and Mr. Wilson that we detest and deplore such criminal conduct and that we punish it strongly and appropriately. This may or may not have lasting effect on these children; it will help in precluding its having such effect to show them how strongly we punish such conduct. If I may be so presumptuous as to suggest to the court a sentence between twelve and seventeen years; ordinarily on the surface this seems rather light for such an array of offenses; however, I will call the court's attention to the man's age, his previous good service, and his plea which precluded these

children having to come into this court to testify on the witness stand. More than seventeen years, I believe, would be inappropriate; less than twelve certainly inadequate.

IDC: May it please the court, I do not want to continue the trial too long—only a few words in replying to the argument of trial counsel. He attacked the opinion of the psychiatrists in the argument that practically speaking every man who commits acts of this kind in the homosexual field is definitely to be considered abnormal so the psychiatrists will go out and say: "Well, we have a kind of a split personality," which would mean in terms that no man who ever commits offenses of this kind could be considered fully normal and would be the kind of a case as the psychiatrists have testified here. I do not think this is correct. I think a psychiatrist knows well how to determine the degree of mental incapacity, and he knows, of course, where otherwise we wouldn't need ever a psychiatrist in a case of sexual offenses, how to determine that this man having committed abnormal acts is so to be considered, in the psychiatric way, an abnormal man or not. So, in other words, we shouldn't mix up at all the fact that a sexual offense is always a kind of abnormal act, which it is, and the fact that it depends, of course, entirely on the kind of personality and the degree of mental illness to which extent we may be able to say here is a normal-abnormal man—if I might use this expression—having just committed abnormal acts but he is completely normal, or, to which degree here is a man who does and commits abnormal acts but still, from a psychiatric point of view, deserves our leniency and mitigation in every way because his mental capacity, which has nothing to do with the kind of acts he committed, is inferior so much or that it is not of a degree as in a normal being. In other words, I cannot accept the thesis that anybody who commits homosexual acts should be considered abnormal and there would be no room for psychiatric examination. If this were the case I think we should dispose of any psychiatric examination in any court trial, which, as you all from your experience know, never has been done; on the contrary, the fact sometimes that this kind of homosexual relations are being committed, in certain cases they lead sometimes to the conclusion it is very good and proper in this case to have a

psychiatrist examine the man; but it is not absolutely sure that any act of this kind is to be considered an abnormal act, so we have to mete out a sentence and not bother about the degree of mental incapacity. I can only repeat in this particular case that, according to both psychiatrists, we have not only a small degree but we have such a high degree of mental incapacity that it may be even doubtful whether it is a few inches to the right

36 or a few inches to the left of the borderline. The defense is of the opinion that it is a borderline case without legal insanity, which we maintain strongly, and we ask the court to kindly follow us in this respect and to follow the psychiatrists. We have a case here of a very strong degree of mental inferiority which has to be considered when you mete out the sentence.

In conclusion allow me, please, to say one word in regard to the objects of these offenses—the boys and the juveniles who have been concerned. I know it is our duty to protect the young kids and I know, too, that we should consider perhaps lasting effect on these children. I cannot at this time, for technical reasons, introduce any evidence or refer to anything in this matter because after all the defendant has pleaded guilty, and having been sentenced as guilty we can only talk now about the degree of his guilt and about the circumstances in his favor or in his disfavor; but, since the trial counsel has introduced a kind of a reflection on the record I might call the attention of the court to the fact that if you read these trial records you will find, as I found, that actually all the boys concerned in this matter have been knowing quite well. I was amazed, if I might say this in conclusion, at the enlightenment, at the knowledge which these boys had developed in this particular field. I must say that it was quite a new experience to me, after reading these records, and I am sure the court has done so, seeing how well these boys concerned have been familiar with facts of life and facts of homosexual life. I do not wish, of course, that there could be ever any lasting effect on these boys, and I wish to say that just this idea and this consideration was it which made the accused man plead guilty to all charges because we wanted purposely and intentionally to avoid any of the repercussions which may have been

derived from putting anybody of the witnesses on the stand and having him going through the memories again. Nevertheless, if we tried to exhaust the record, if we are trying to appreciate and trying to follow it in any way, then we should not deny the fact that actually there was a kind of life going on in the community of these boys which apparently proves and shows that they knew much more about these things and that they practiced much more about these things than we can usually assume. It shows you, Gentlemen, that whatever the Code will say, and whatever our judicial conscience will feel about it, life is sometimes a little bit different from the way this Code has been created at the time of legislation. Life shows that certain things are usual and they happen actually without our wanting it, just because young men are now apparently more experienced and do certain things which perhaps are just as punishable under the law as the offenses committed by the accused here. We should bear in mind, of course, that these things are common, are usual, and though with disapproving them we should not deny the important fact that they still do not consider any crime of any offense worthy of this harsh sentence which the trial counsel has proposed you may impose upon the accused.

Again I ask you to please exercise your right for leniency and do not close the door entirely for this man in life. Give him the opportunity of again proving that he can be and will be a valuable member of society and take his place in our daily life as before. Thank you.

37 LO: Has the prosecution anything further?

TC: No sir, it does not.

LO: Although the Manual provides that the limitations set out in the Table of Maximum Punishments in paragraph 127c of the Manual are not binding upon courts in sentencing civilians subject to military law, the Manual does provide that the Table of Maximum Punishments may be used as a guide in determining appropriate punishment for civilians subject to military law, and, any confinement at hard labor imposed by you should not exceed the maximum provided in the Table of Maximum Punishments.

There are other limitations as to what may be legally imposed in the form of a sentence in this case. A civilian

subject to military law cannot be reduced in rank or grade; likewise, a civilian subject to military law is not subject to any type of punitive discharge or separation from the service. A court-martial may not adjudge hard labor without confinement against a civilian and, ordinarily, a fine rather than a forfeiture is the proper monetary penalty to be adjudged against a civilian subject to military law. Thus, the court-martial here today is limited in determining punishment to these types of punishment:

First, deprivation of liberty by way of confinement at hard labor or restriction to limits;

Second, adjudgment making the civilian pecuniarily liable in general to the United States for an amount of money specified in the sentence; and

Third, reprimand or admonition.

The Table of Maximum Punishments provides a maximum of seven years confinement at hard labor for each separate offense of indecent act or liberty with a child under the age of sixteen years. This is the offense alleged in the Specifications of Charge I. The Table provides a maximum of five years confinement at hard labor for each separate offense of sodomy, the offense charged in the Specifications of Charge II. The Table provides for a maximum of four months confinement at hard labor for each of the offenses charged in the Specifications of the Additional Charge. Thus, the cumulative maximum total in terms of confinement at hard labor which may be imposed here for the offenses charged is twenty-nine years and eight months.

If, in your deliberations, you should determine that a monetary penalty is appropriate you will find no guide in the Manual for measuring appropriate quantity. The Manual does, however, point out that the court should consider ability to pay, and provides further that in order to enforce collection a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid the person shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered equivalent to the fine has expired.

38 Do you have any questions on what I have said so far or are there any questions that remain unanswered?

President: There appear to be none.

LO: I hand you now a sentence work sheet which may aid in properly reducing your sentence to writing. I hand the defense a copy of it for their inspection. You should, after finally determining your sentence, strike from the sentence work sheet the portions that are inapplicable and fill in the blanks as appropriate. You will see that there is a space on there for punishments which I have mentioned previously but which are not included in the work sheet.

Any questions now?

President: No.

TC: Do you have any objections to the work-sheet?

DC: No actual objections. I would like to point out that the way in which the brackets are arranged here could possibly lead to the conclusion that a fine is mandatory. In other words, the portion on fine is not included in brackets. I would like the court to be advised on that.

President: I think we understand that..

LO: My instruction, I think, has made that patently clear. In addition, I would refer defense counsel to the Manual for Courts-Martial to the model sentences; this is taken directly from the Manual.

President: The court will be closed.

The court closed at 1135 hours, 21 August 1956.

The court opened at 1210 hours, 21 August 1956.

President: The court will come to order.

TC: Let the record indicate that all parties to the proceedings who were present when the court closed are again present in court.

President: Bruce Wilson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

To be confined at hard labor for ten years.

39 LO: Has the prosecution any further cases to try at this time?

TC: It does not, sir.

President: The court will adjourn to meet at my call.

The court adjourned at 1211 hours, 21 August 1956.

40 AUTHENTICATION OF RECORD OF TRIAL
in the case of

BRUCE WILSON, AGO A-407 943, GS-11, Department of
the Army Civilian Comptroller Division, Berlin Command
(7781), Department of the Army, Berlin, Germany

FRANCIS X. BRADLEY

Francis X. Bradley

Lt. Col., Inf., President

HORACE L. JENNERSON

Horace L. Jennerson, Lt Col, SigC,

a member in lieu of the law officer

because of his absence.

I have examined the record of trial in the foregoing case.

MELBURN N. WASHBURN

Captain, JAGC, Defense Counsel

41

Defense Exhibit "A"

Form approved.

Budget Bureau No. 50-R0123.

Standard Form No. 51

August 1946

U. S. Civil Service Commission

Administrative-Unofficial ()

Official:

Regular () Special ()

Probational (x)

REPORT OF EFFICIENCY RATING

As of 22 August 1947 based on performance during
period from 22 Oct 1946 to 22 Aug 1947, Bruce Wilson,
Auditor, CAF-930-9, Fiscal Section, PHILRYCOM, APO
707

42

3 September 1947

Your efficiency rating from 22 Oct 46 to 22 Aug 47 is
Excellent.

DONALD O. THURNAU

Donald O. Thurnau

Chief, Adm Div, CPS

43

Defense Exhibit "B"

HEADQUARTERS
USAREUR AUDIT AGENCY, 7756TH AU
APO 757 U.S. ARMY

25 January 1955

Dear Mr. Wilson:

I am happy to forward Standard Form 50, dated 20 January 1955, which discloses your promotion from GS-10 to GS-11.

This promotion is made possible through a reclassification of your position and a related determination that your experience and/or educational qualifications meet Civil Service requirements, together with my belief that your performance with this Agency has been of such quality as to warrant placing you in a position of higher trust and responsibility.

Please accept my heartiest congratulations on this achievement.

Sincerely yours,

/s/ J. A. MARTIN

J. A. Martin

Colonel FC

Chief

Mr. Bruce Wilson
Resident Auditor
Berlin Audit Residency
USAREUR Audit Agency

A Certified True Copy

ZANE E. FINKELSTEIN

Zane E. Finkelstein, 1st Lt. JAGC

Trial Counsel

Defense Exhibit 'C'

HEADQUARTERS

USAREUR AUDIT AGENCY, 7756TH AU

APO 757

US ARMY

AA-C 201-WILSON, Bruce (Civ)

24 August 1955

SUBJECT: Letter of Appreciation

To: Mr. Bruce Wilson
Resident Auditor
Berlin Audit Residency
USAREUR Audit Agency, 7756th AU
APO 742, US Army

1. With the imminency of your departure from this organization, I wish to take this opportunity to extend my sincere thanks and appreciation to you for a splendid performance of your assigned duties.

2. Although I have have not had the opportunity to observe your work for a prolonged period, the high praise which I heard showered upon you during my recent trip to the Berlin Command left no doubt in my mind of the high calibre of performance you have rendered. All elements of the Berlin Command had infinite regard for your abilities, were appreciative of your sound advice and counsel, and enjoyed your friendly cooperation. Your actions and performance have done much to enhance the reputation and prestige of this agency throughout the Command.

3. This agency will miss your help but we are glad that you have found the opportunity for employment more in accordance with your desires. The best wishes of myself and staff accompany you to your new assignment.

4. A copy of this correspondence has been made a part of your official 201 file.

/s/ J. G. BLACK

J. G. Black

Colonel FC

Commanding

A Certified True Copy

ZANE E. FINKELSTEIN

Zane E. Finkelstein, 1st Lt. JAGC

Trial Counsel

45

Defense Exhibit "D"

UNITED STATES

-vs.-

BRUCE WILSON, CIV.

STIPULATION

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused, that if Dr. Werner Jaffe, 8 Paulsborner Strasse, Berlin, Germany, were present in court and duly sworn, he would qualify as an expert witness in psychiatry and would testify substantially as follows:

I am presently engaged in the practice of medicine, specializing in psychiatry and neurology in Berlin, Germany. I have studied both in Germany and the United States, have been a resident psychiatrist in an American hospital, and have practised psychiatry in New York City.

Mr. Bruce Wilson was seen by me about five times during the month of July and August 1956 at the 279th Station Hospital in Berlin, Germany, for psychiatric interview. According to his physical constitution, personal development and status, he can be classified as a typical schizoid personality, not to be confused with a schizophrenic. He gives a history of having descended of a family where strictness seemed to be more important than warmth or affection, and he apparently had and has no contact with his family and no real attachment of parent and sibling.

His life appears to have been an unsteady one concerning both his professional and his interpersonal relations. His history indicates that he never had any true and warm attachments for any person or object. I had the impression that the only time he seemed to show some kind of emotion was when he talked of his three dogs, two of which had to be killed during his absence. He is a person without any

deep-seated and lasting interpersonal or social relations at all.

He has had hetero- and homosexual relations as well. He never experienced any kind of real love in the broader sense and on a mature level. He never experienced a lasting friendship and does not feel that he belongs to anybody, society, or religion besides himself. His history indicates that all interpersonal, social, or professional experiences or attachments were of short duration and quite superficial. The early development, socialization, sexual attitude, social adjustment, and occupational history are quite significant for a schizoid, self-centered personality. In the field of general behavior, sensorium, and intellectual capacities, Mr. Wilson does not show any abnormal

46 signs. It is my opinion that, at the time of the offenses with which he is charged, he was capable of distinguishing right from wrong and of adhering to the right, and that at the present time he is capable of understanding the nature of the proceedings against him and cooperating in his own defense.

The emotional picture is superficially one of indifference and euphoria. There are, however, underlying anxieties, tensions, and much hostility against the world and society in which the patient feels misunderstood.

Thought contents and thought mechanism are not psychotic. There is no insight that the trouble the patient is in at the moment arose from his abnormal personal troubles and are not caused by a "backward" society.

Besides the abnormalities mentioned, there are definite psychopathic personality traits. Before and during the interview, the patient mentioned quite often the fact that the room may be wired, that the guard may be listening to the interview, that in the room next to the one we were in a recording machine may be installed, and so forth. Consequently the patient crawled quite frequently about the floor all over the room looking under tables, watching the central heating system, window vents, and so forth.

The patient admits having drunk much alcoholic beverages because of living under nervous strain from overwork in his office. He thinks that the influence of overwork, nervous strain, and drinking habits were responsible for the sexual aberrations which occurred in his home and which finally gave rise to his present difficulties.

Summarizing all the facts known about the early development of Mr. Wilson, of his position in society, his professional ways, his sexual habits, and his kind of thinking, one may call Mr. Wilson a rationalizing, self-centered, schizoid personality, as distinguished from any mental aberration, who, while legally sane, never had and never will have any real deep-seated or true emotionally underlined contact with anything or anybody besides himself.

His incapability of adjusting to any kind of sexuality of a lasting hetero- or even homosexual kind should be judged only as a part of a general, almost psychotic disturbance of his personality and the impossibility of any kind of adjustment and normal interpersonal contact. Mr. Wilson should therefore be considered a psychopathic personality on the borderline of schizophrenia.

MELBURN N WASHBURN

Melburn N Washburn

Capt, JAGC

Defense Counsel

BRUCE WILSON

Bruce Wilson

DA Civilian

Accused

ZANE E FINKELSTEIN

Zane E Finkelstein

1st Lt, JAGC

Trial Counsel

DR. ARTHUR BRANDT

Individual Defense Counsel

47

Defense Exhibit "E"

UNITED STATES

vs.

BRUCE WILSON, CIV.

STIPULATION

It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused,

that if Captain H. M. Bertram, Medical Corps, 279th Station Hospital, Berlin, Germany, were present in court and duly sworn, he would qualify as an expert in psychiatry and would testify substantially as follows:

I have conducted psychiatric examination and evaluation of Mr. Bruce Wilson. As a result of my examination, I conclude that at the time of the offenses with which he is now charged, he was mentally capable of distinguishing right from wrong and of adhering to the right, and that at the present time he is capable of understanding the nature of the proceedings against him and of cooperating in his own defense.

I have further concluded that, although Mr. Wilson is not psychotic, he is a psychopathic personality tending toward and on the borderline of schizophrenia.

ZANE E. FINKELSTEIN

Zane E Finkelstein

1st Lt, JAGC

Trial Counsel

MELBURN N WASHBURN

Melburn N Washburn

Capt, JAGC

Defense Counsel

DR. ARTHUR BRANDT

Individual Defense Counsel

BRUCE WILSON

Bruce Wilson

DA Civilian

Accused

Appellate Exhibit 1

UNITED STATES

vs.

BRUCE WILSON, AGO A-407 943, GS-11, Department of the Army Civilian Comptroller Division, Berlin Command (7781) Berlin, Germany

0946 Hours, 21 August 1956

OUT-OF-COURT-HEARING

LO: What is the nature of your argument?

IDC: I, on behalf of the accused, move for the dismissal of the charges for reasons of lack of jurisdiction. This is the first case, to my knowledge, where any civilian employee of the Army was subject to court-martial. The general rule of this kind recognizes that the military jurisdiction is exercised also in regard to civilian employees yet no case of this kind, to my knowledge, has ever been decided upon by the Supreme Court so, of course, I have to leave this question as it stands and leave it perhaps to future review by civil courts or by the board of review whether really, as generally assumed, there is jurisdiction over civilian employees. In this particular case I would like to emphasize, however, that the accused was formerly under contract with the Army as a civilian employee but which contract had expired years ago and from there on has been silently continued on a verbal basis. This contract has been finally terminated by the voluntary resignation tendered by the accused effective yesterday. I think it can be assumed or, if necessary, we may submit evidence that it is a fact that the accused has tendered his resignation to the Civil Personnel Officer effective August 20, at 1700 hours. According to the opinion held by the defense, the termination of the employment also makes cease the jurisdiction of the military court with certain exceptions and I must add here, and I can now refer to the Manual on page 14, that none of these exceptions, in my opinion, fall under the category we have to decide here. Exception number one reads that to the general rule of ceasing jurisdiction some exceptions are recognized which include the following: "Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in the status in which he was subject to the code"—no doubt this is the case but in this case also it is said: "and for which he cannot be tried in the courts of the United States or any State or Territory thereof" and so on. Number three: "Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned."

Now three factors have been combined to make jurisdiction possible. Number one is given; number two, in my opinion is not given for the simple reason that the accused, being a civilian, even if he is outside the territory of the United States he can always be tried
 49 by a civil court within the territory of the United States even if the offense he is being charged with has been committed outside the territory. We have these cases in many instances. I remind you perhaps of the quite famous case of the Major—I don't want to call his name—who committed, while in the Army, a murder on the Beach of Cassino in Italy, and he was charged with having killed his superior officer and finally after being discharged was brought to justice before the Federal Civilian Court in the United States. So having jurisdiction over a civilian who is now, at the time we start proceedings here, an employee of the United States Army, in my opinion the jurisdiction has ceased definitely from the moment on where he terminated his employment with the Army. Whereas it may not be decided upon right now I raise the objection for the record; also it is very doubtful, in my opinion, that at the time he committed the offenses even if at this time he was an employee of the Army he would be subject to military procedure and to court-martial.

I know that there will be an objection raised by the trial counsel. I know it is generally assumed, although no foundation for this assumption has ever been given, that when a trial has started whereby the definition of the trial is apparently used in a wider and broader sense, in other words if military procedure has opened and at this time the accused was subject to military procedure, then if this has been done with a view to trial it will continue. I do not see any foundation in this assumption, there is no proof for it, it is just a general idea, but on the other hand I feel it is my duty to bring this to the knowledge of the law officer and have it put into the record. I do not see any foundation for the generally assumed fact that just the opening of a proceeding or the opening of an investigation, which is always the case, with a view to later trial will practically establish court-martial jurisdiction—military jurisdiction—once and for all. In my

opinion the termination of the employment by the accused makes him not longer liable and subject to military procedure and for this reason I move to dismiss the charges for lack of jurisdiction.

DC: If I may I would like to add just one thing. If the law officer requires it defense is prepared to prove that Mr. Wilson's resignation, effective yesterday, was received yesterday by the Civilian Personnel Officer in this Headquarters.

TC: Prosecution is willing to stipulate that a piece of paper purportedly signed by Mr. Wilson and purportedly containing his resignation was received by the Civilian Personnel Officer in this Command yesterday.

The court's attention is respectfully directed to the provisions of paragraph (11), Article 2 of the Uniform Code of Military Justice, which provides that: "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following * * * " non-applicable territorial limitations, are subject to the code.

50 Prosecution is prepared to prove that the accused has been employed by the United States Army for the last nine years and five months and at the time of the offenses, his apprehension, the reference for trial, and the service of charges, he was employed by the Comptroller Section of Berlin Command, he was entitled to MPC's and was so paid, that he carried an AGO Card and a Passport indicating that he was accredited to the U. S. Commander of Berlin; that the accused occupies an apartment built under the supervision of the Berlin Command Engineer upon property requisitioned by the United States Army and with funds provided for the cost of occupying Berlin; that the accused had previously entered and departed Berlin pursuant to orders issued by order of the Commanding General of Berlin Command; that the accused regularly purchased goods and services from the European Exchange System operated by the United States Army, the Quartermaster Commissary Store, and the U. S. Army Post Office; that his dogs and telephone were and

are listed in separate registers and directories maintained by the United States Army; that, in short, the accused at the time of the offenses was and is now a member of the military community of Berlin as distinguished from the indigenous population. The prosecution can further show that the accused by being so employed and by so accompanying the U. S. Army in Berlin is not subject to the civil or criminal jurisdiction of the Berlin Courts pursuant to Allied Kommandatura Law 7.

The power of Congress to make amenable to military jurisdiction the classes of civilian personnel mentioned in the cited reference to the Uniform Code of Military Justice, including the accused, is so well settled as to be really beyond dispute. The attention of the court is respectfully drawn to Aycock and Wurfel "Military Law Under the Uniform Code of Military Justice", on page 53 et seq., where a complete digest of all the cases, including United States Supreme Court cases, can be found, and to the recent United States Supreme Court cases of *Kinsella v. Krueger*, 713, and *Reid v. Covert*, 701, decided on 11 June 1956, wherein congressional power to make such persons subject to military law is given renewed sanction.

With regard to the accused's resignation, it is well settled that jurisdiction once attached continues for all purposes. The Executive Order provision for this can be found in paragraph 11d, Manual for Courts-Martial, 1951, that the accused cannot terminate it by his own voluntary act. I respectfully call the court's attention to *Perlstein v. United States*, 151 Federal 2d, on page 167, where a certiorari was dismissed by the United States Supreme Court at 328 U.S. 822, and the recent case of the *United States v. Rubenstein* recently decided by the U. S. Court of Military Appeals. In the latter case the accused, prior to apprehension, prior to service of charges, quit his job and removed himself to the Republic of Korea; the court therein held that he was still amenable to the Uniform Code of Military Justice. The *Covert* case is interesting in this particular since a rehearing was ordered by the Court of

51 Military Appeals and the rehearing was held in the United States, and again the court, with the United States Supreme Court sanction, stated that jurisdiction once attached continues for all purposes.

IDC: The defense does not deny that at the time of the charged offenses the accused was employed; only the defense maintains that at the time of the trial, as of today, the employment has terminated which, of course, the trial counsel does not object to either. Now, of course, as to the legal aspects of this case I should like to refer to the section of Article 3 (a) of the Code which seems to me the essential one.

Article 3 (a) again absolutely makes it essential that as a requirement for military jurisdiction you must establish the fact that the person cannot be tried in the courts of the United States or any territories thereof. This is not the case in our case. We have a situation here where a man having terminated his employment with the United States Army can always be tried in the Federal Court of the United States in spite of the fact that the offenses charged have been committed outside of the United States, and this factor missing I do not see any chance how military procedure can continue—we have to turn him over to the civilian authorities and courts. The trial counsel refers, in this respect, to the so-called effect of termination of term of service which is reprinted in the Manual on page 16. May I respectfully call the attention of the law officer to the fact that this apparently does not concern our case. We have there a case that if action is initiated with view to trial because of an offense committed by an individual prior to his official discharge, he may be retained in the service for trial to be held after his period of service which otherwise had expired. We have here, first of all, nothing but the Command; we have nothing which can be considered the real opinion of the higher court; and secondly, it does not affect our case because apparently this is a case where someone can be retained in the service so it must be a person really being enlisted or otherwise belonging to the armed forces which can then be retained in the service and this, you will agree with me, cannot be done in the case of Mr. Wilson. He is a civilian employee and he is always in the position and able and capable of terminating the employment, and the case apparently meant there has not definitely been decided; the opinion of the Manual has never been decided, to my knowledge, and this case does not absolutely affect the

decision we have to make here. So, not only for the record but also for the actual dismissal of the charges, I move that here is no jurisdiction and for lack of jurisdiction my motion goes for dismissal of the charges.

TC: If the law officer please, one further factor for the record. I think the court is capable of judicially noting - and the law officer also—that Berlin, Germany, is outside the territorial and maritime jurisdiction of the United States and outside the applicable provisions of Title 18 of the United States Code. The recent case of *Toth v. Talbott* casts sincere doubt upon the applicability of Article 3 (a) of the Uniform Code of Military Justice and the trial counsel is not relying solely thereupon.

52 The trial counsel is relying on Article 2 (11) of the Uniform Code of Military Justice, primarily on the assertion that the jurisdiction exists.

LO: What is the citation—I believe you said Perlstein—

TC: Yes sir. *Perlstein v. United States*, 151 Federal 2d, 167; certiorari dismissed at 328 U.S. 822.

IDC: May I, with your permission, raise one last point? It had better be raised in a question. Under Article 3 (a) has the necessary consent been obtained of the Secretary of the Department concerned?

TC: Prosecution is most willing to stipulate that there is no express permission from the Secretary of the Army to try this particular case.

IDC: You mean to say that it is necessary but the answer would be that it hasn't been obtained?

TC: I am not willing to concede that it is necessary; I am willing to concede that it has not been acquired.

IDC: Thank you.

LO: The motion for dismissal on the ground of lack of jurisdiction is denied.

The court will be recalled.

Let the record reflect that present at this out-of-court hearing was the law officer, the accused, counsel for both sides, and the reporter, and that a verbatim transcript of the proceedings will accompany the record as Appellate Exhibit 1.

The out-of-court hearing was terminated at 1019 hours, 21 August 1956.

COURT OF MILITARY APPEALS

UNITED STATES, Appellee

v

BRUCE WILSON, GS-11, Department of the
Army, Civilian, Appellant

9 USCMA 60, 25 CMR 322

Courts-martial § 47—constitutionality of jurisdiction over
civilian employees overseas.

1. The provisions of UCMJ, Art 2(11) extending court-martial jurisdiction to persons employed by the armed forces without the continental limits of the United States and certain territories thereof, are constitutional insofar as applied to a civilian employee of the Army who was in Germany pursuant to his employment, who used military housing and exchange facilities in connection with his employment and residence in Germany and who was not subject to the civil or criminal jurisdiction of the German courts. (Citing U. S. v Burney, 6 USCMA 776, 21 CMR 98; U. S. v Rubenstein, 7 USCMA 523, 22 CMR 313; U. S. v Marker, 1 USCMA 393, 3 CMR 127 and other cases. Distinguishing Reid v Covert, 354 US 1, 1 L ed 2d 1148, 77 S Ct 122.)

Courts-martial § 47—jurisdiction of civilian employees
overseas—effect of resignation.

2. The accused's amenability to trial by court-martial was not terminated by his submission of his resignation from his job the day before trial where charges had been served and the Art 32 investigation had been conducted almost two months earlier. Under these circumstances, jurisdiction had attached before tender of the resignation and the proceedings could, therefore, continue to completion. (Citing U. S. v Robertson, 8 USCMA 421, 24 CMR 231; U. S. v Rubenstein, 7 USCMA 523, 22 CMR 313.)

Defenses § 35; Pleas § 9—evidence of mental condition insufficient to render guilty plea improvident.

3. The evidence of the accused's mental condition, presented during the sentence proceedings, was not incon-

sistent with his pleas of guilty where, although indicating the accused was suffering from a disorder described as a schizoid personality, the psychiatric testimony also indicated the accused was capable of distinguishing right from wrong and of adhering to the right and was able to understand the proceedings against him and to cooperate in his defense. Furthermore, the defense counsel specifically stated he was not contending the accused was insane and only wanted the accused's mental condition considered as a matter of extenuation and mitigation. (Citing U. S. v Hinton, 8 USCMA 39, 23 CMR 263.)

No. 9638

Decided March 28, 1958

On petition of the accused below. CM 392423, not reported below. Affirmed.

First Lieutenant Jerome H. Gerber argued the cause for Appellant, Accused. With him on the brief were *Colonel James M. Scott*, *Captain Arnold I. Melnick*, and *First Lieutenant Bert M. Gross*.

54 *First Lieutenant Richard W. Young* argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel John G. Lee*, *Lieutenant Colonel Thomas J. Newton*, and *First Lieutenant Arnold I. Burns*.

Joseph M. Snee, S.J., on amicus curiae brief.

Arthur John Keeffe, Esquire, on amicus curiae brief.

Rear Admiral Chester Ward, USN, and *Commander Carl B. Klein, USNR*, on amicus curiae brief.

Lieutenant Colonel Robert W. Michels, USAF, and *Major Fred C. Vowell, USAF*, on amicus curiae brief.

Opinion of the Court

ROBERT E. QUINN, Chief Judge:

The accused is a civilian. He was employed by the Department of the Army in the Comptroller Division, Berlin Command. He went to Berlin on a passport accrediting him to the U. S. Commander of Berlin, and he entered and departed from Berlin at various intervals during his employment pursuant to orders issued by the military.

Military housing and exchange facilities were used by him in connection with his employment and residence in Berlin. It also appears that he was not subject to the civil or criminal jurisdiction of the Berlin courts by virtue of the provisions of Allied Kommandatura Law No. 7.

On his plea of guilty, a general court-martial convicted the accused of three acts of sodomy, in violation of Article 125, Uniform Code of Military Justice, 40 USC § 925, two charges of lewd and lascivious acts with persons under the age of sixteen; and two specifications alleging the display of lewd and filthy pictures to minors, with the intent to arouse their sexual desires. It is contended that because the accused is a civilian he is not constitutionally subject to trial by court-martial. We rejected like arguments in a number of previous cases and sustained the constitutionality of Article 2(11) of the Uniform Code which subjects to trial by court-martial "persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and without certain other territories of the United States. *United States v Burney*, 6 USCMA 776, 21 CMR 98; *United States v Rubenstein*, 7 USCMA 523, 22 CMR 313; *United States v Marker*, 1 USCMA 393, 3 CMR 127.¹ The question is raised anew, however, by the decision of the United States Supreme Court in *Reid v Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222 (1957). In that case the Supreme Court held Article 2(11) to be unconstitutional as applied in a capital case to a civilian dependent of a serviceman who accompanies such serviceman outside the United States and the specified territories.

Writing the majority opinion for the court, Mr. Justice Black noted that the wives, children, and other dependents of servicemen could not be regarded as members of the land and naval forces, though accompanying servicemen abroad at Government expense and receiving benefits from the Government such as quarters, medical care and ex-

¹ We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2, rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel. See TTAS 3425, 3427; also *Reid v. Covert*, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222, footnote 61.

change privileges, any more than if they were "living on a military post in this country." As citizens of the United States they were entitled, in a capital case, to indictment by a grand jury and to trial by a jury in a court of law, as required in the Fifth and Sixth Amendments to the United States Constitution. In the course of his opinion,

Justice Black referred with approval to Colonel Winthrop's statement that no statute can be framed
55 *"by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."* Significantly, however, the Justice specifically observed that

"there might be circumstances where a person could be 'in' the armed services for purposes of clause 14 [of Article I, section 8 of the United States Constitution] even though he had not formally been inducted into the military or did not wear a uniform." *Id.* at page 23. From the latter standpoint the critical inquiry is the nature of the civilian's "contact or relationship with the armed forces." *Id.* at page 30.

Under clause 14 of Article I, section 8, Congress is granted the power "to make Rules for the Government and Regulation of the land and naval Forces." In exercising its power Congress does not act as an automaton. Rather, it possesses wide discretion to determine the measures and means necessary for complete and effective use of its power. Contemporaneously with the adoption of the Constitution, Congress subjected to military law "retainers to the camp" because they were closely connected with the proper functioning of the uniformed forces in the field. Under the Uniform Code, the designation has been changed by Congress to include persons "employed" by the armed forces in foreign lands. Cogent reasons exist for the identification of such persons with uniformed personnel for the purpose of the regulation of their conduct. We discussed many of these reasons in the *Burney* case, and we need not reiterate them here. See also *United States v. McElroy*, 158 F Supp 171 (D DC) (1958), in which Judge Holtzoff denied a petition for habeas corpus for a civilian employee convicted by an Air Force court-martial at the Nouasseur Depot, Morocco. Suffice it to say that employees of the armed forces abroad are not present with the military merely for morale or convenience. They both

live and work in the military community. They are required for, and are depended upon to carry out, the assigned missions of the military forces overseas. Functionally, as well as practically, they are either "part of the armed forces" or "so directly connected with such forces" as to be inseparable from them for the purpose of observing the standards of conduct prescribed by Congress for the government of the military.

In recognizing the essential oneness of service and community life between those in uniform and those out of uniform, Congress did not expand military jurisdiction "at the expense of the normal and constitutionally preferred system of trial by jury." *Toth v Quarles*, supra, pages 22-23. It was simply exercising its constitutional power to make rules for the government of the armed forces. We hold, therefore, that as applied to employees of the armed forces under the circumstances of this case, Article 2(11) of the Uniform Code is constitutional.

The accused also attacks the right of the military to try him on the ground that he terminated his amenability under Article 2(11) by submitting a resignation from his job. The resignation was tendered the day before trial. Charges had been served and the Article 32 pretrial investigation had been conducted almost two months earlier. Manifestly, jurisdiction over him had attached long before the tender, and the proceedings could, therefore, continue to completion. *United States v Robertson*, 8 USCMA 421, 24 CMR 231; *United States v Rubenstein*, 7 USCMA 522, 22 CMR 313.

Turning to the merits of the case, the accused contends that he was prejudiced by the law officer's failure to withdraw his plea of guilty and direct that he be tried as though he had entered a plea of not guilty. He maintains that evidence of his mental condition, which was presented during the sentence procedure, is inconsistent with his plea of guilty on four of the charges. See Article 45(a), Uniform Code of

² *Toth v Quarles*, 350 US 11, 15, 100 L ed 8, 76 S Ct 1 (1955).

³ *Duncan v Kahanamoku*, 227 US 304, 313, 66 S Ct 606, 90 L ed 688 (1946).

Military Justice, 10 USC § 845; United States v. Trede, 2 USCMA 581, 10 CMR 79.

56 The evidence relied upon by the accused is in the form of a stipulation of testimony by two psychiatrists. One doctor described the accused as a "typical schizoid personality, not to be confused with schizophrenia." The witness went on to say that in "the field of general behavior, sensorium, and intellectual capacities," the accused does not show "any abnormal signs." The doctor also observed that the accused—thought content and thought mechanisms were not psychotic and he found "no insight that the trouble the patient is in . . . arose from his abnormal personal troubles." Finally, the doctor said that in his opinion the accused was capable of distinguishing right from wrong and of adhering to the right at the time of the commission of the offenses and that he was able to understand the proceedings against him and to cooperate in his defense. The stipulated testimony of the second doctor is substantially to the same effect. In part, he said that the accused tended "toward and on the borderline of schizophrenia."

At the trial the accused was represented by individual civilian counsel and appointed defense counsel. In evaluating the psychiatric evidence the accused's counsel conceded that it raised no issue regarding the accused's legal responsibility for the offenses to which he pleaded guilty. Individual counsel in part said:

" . . . The word 'borderline' may cause the impression that here is a man who may be insane. *The defense had definitely refrained from raising this issue; we are of the opinion that our client is sane in the legal sense* which does not mean, however, that there are grave doubts about the strong degree of mental incapacity, as you have to call these borderline cases. We cannot exactly determine the degree in percentage but we have to assume that both psychiatrists having examined the accused for several times and having him subjected even to a so-called electro-encephalogram test—to a real brain test, if they concur in the

* In the lexicon of psychiatry the described condition falls into the category of behavior disorders. SR 40-1025-2, June 1949.

opinion that this man is to be considered on the borderline-between mental incapacity and capacity we know something at least. *Assuming that he is legally sane, which I do not doubt a moment*, still the degree having brought him to the borderline of schizophrenia, the degree to which he is to be considered mentally inferioritated, mentally incapacitated, seems to me a very high one. *I, therefore consider the opinion of the psychiatrists as a most important one*, and I ask you to kindly consider this opinion as an essential factor in determining to which extent he deserves extenuating and mitigating "circumstances." (Emphasis supplied.)

A similar situation was presented to us in *United States v. Hinton*, 8 USCMA 39, 23 CMR 263. What we said there applies equally to this case and provides a complete answer to the accused's claim of error.

"Incidental evidence of a mental condition is not proof of the existence of the condition to that degree which the law requires before it will hold harmless a person who commits an act which, but for the condition, would be criminal. . . . In a guilty plea case we cannot disregard the probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense or to negate the existence of a specific intent. As a result, they could well have decided to disregard the evidence in favor of the possible advantage of a guilty plea. . . . The critical question, therefore, is whether the accused and his counsel were aware of the legal effect of the evidence claimed to be inconsistent with the plea of guilty.

* * * *

"... Moreover, it is not contended on this appeal that the accused is anything but legally sane and fully responsible for the offenses for which he was convicted or even that he has any other meritorious defense. Under the circumstances, we must conclude that the plea of guilty was not improvidently entered. Indeed, on this record it would be a 'hollow gesture' if

we were to set aside the plea of guilty and order a rehearing. *United States v Wright, supra*, page 189."

The decision of the board of review is affirmed.
Judges LATIMER and FERGUSON concur.

58

6161

(File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 6161

THE UNITED STATES OF AMERICA
ex rel. BRUCE WILSON, *Petitioner*.

v.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimons Army Hospital, Denver, Colorado,
Respondent.

Messrs. Arthur John Keefe, Esq., George J. Noumair, Esq., Washington, D. C., and William C. McCleary, Esq., Denver, Colorado, for Petitioner; Donald E. Kelley, Esq., United States Attorney, and John S. Pfeiffer, Esq., Assistant United States Attorney, Denver, Colorado, and F. M. Sasse, Colonel, JAGC, Fitzsimons Army Hospital, Denver, Colorado, and Lt. Col. Peter S. Wondolowski, JAGC, U.S. Army, Washington, D. C., for Respondent.

Memorandum Opinion and Order—Nov. 10, 1953

ARRAJ, District Judge.

This matter is before the Court on a petition for a Writ of Habeas Corpus. The petitioner is and at all times pertinent hereto was a citizen of the United States employed as a civilian auditor by the Department of the Army in the Comptroller's Division in Berlin, Germany. During the time he was so employed, petitioner was charged with certain offenses in violation of Articles 125 and 134 of the Uniform Code of Military Justice. On his plea
59 of guilty a General Court Martial convicted him of

various violations of the said Articles and sentenced him to 10 years at hard labor; the Commanding General approved the conviction and reduced the sentence to 5 years. The Board of Review affirmed the conviction and the Court of Military Appeals affirmed the Board's action. *United States v. Bruce Wilson*, 9 USCMA 60, 25 CMR 322 (1958).

~~Petitioner has been detained and confined under the jurisdiction of the United States Army, under said sentence, since August 21, 1956, and is presently confined in this district at Fitzsimons Army Hospital, Denver, Colorado.~~

Petitioner has filed his Petition for a Writ of Habeas Corpus in this Court contending that his arrest, detention and confinement by the military authorities has been and is unlawful and in violation of the Constitution of the United States; he further contends that as an American citizen and civilian he could not be tried by court martial, and that only a Court constituted under Article III of the Constitution has jurisdiction to try him.

Respondent defends on the ground that jurisdiction was proper under Article 2(11) of the Uniform Code of Military Justice. Thus, the sole question to be determined by this Court is whether Article 2(11) of the Uniform Code of Military Justice can be constitutionally applied to an American citizen employed by the Department of the Army overseas as a civilian who is charged with a crime in time of peace.

Article 2 of the Uniform Code of Military Justice, 10 U.S.C.A. Sec. 802, reads as follows:

Article 2. Persons subject to this chapter.

The following persons are subject to this chapter:

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

The relevant portions of the Constitution under which respondent seeks to sustain the constitutionality of Article 2(11) are Article I, Section 8, Clause 14, which provides that,

"The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval Forces."

and the final clause of Article I, Section 8, which empowers Congress to make all laws which shall be necessary and proper for carrying into execution,

"... the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The starting point in any discussion of Article 2(11) is *Reid v. Covert*, 354 U.S. 1 (1957), which for the first time, raised serious doubts concerning court martial jurisdiction over civilians generally, although the case was directly concerned only with dependents in capital cases. That case involved the trial by court martial of a dependent wife for the premeditated murder of her serviceman husband. Justice Black, speaking for himself, the Chief Justice, and Justices Douglas and Brennan, held that the necessary and proper clause could not expand jurisdiction to cover persons not within the terms of Clause 14. Although he did not define the precise boundary between civilians and those in the land and naval forces, he held that dependents were not within Clause 14, and therefore no authority existed for depriving them of their rights as civilians under other provisions of the Constitution. The language of the opinion is broad in certain phases and it appears to
61 embrace civilians generally, without restriction to dependents. Justice Frankfurter concurred in the result, but limited his opinion strictly to dependents in capital cases.* He found it necessary to,

"Weigh all the factors involved in these cases in order to decide whether these women dependents are so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation' of the 'land and naval Forces' that they may be

subjected to court-martial jurisdiction in capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments."

In weighing these considerations, he concluded that their proximity to the armed forces was not so clearly demanded for the effective government and regulation of the armed forces as to justify court martial jurisdiction over capital offenses. Justice Harlan also concurred in the result, and on even narrower grounds. He reasoned that Clause 14 was modified by the necessary and proper clause, and that dependents had sufficiently close connection with the proper and effective functioning of our overseas forces to justify court martial jurisdiction. On the other hand, whether an absolute right to the guarantees of the Constitution existed depended on the circumstances, and, in a capital case, those guarantees were so important that the dependents here could not be deprived of them. Justice Clark, with whom Justice Burton joined, dissented. They saw no distinction between capital and non-capital cases, and thought that Article 2(11) was reasonably necessary to the power of Congress to provide for the government of our armed forces. Justice Whittaker took no part in the decision.

The first issue to resolve is whether civilian employees of the armed forces overseas are within the terms of Article I, Section 8, Clause 14 of the Constitution.

62 In a series of early cases, paymaster's clerks were held to be "in military service" for jurisdictional purposes; however, it is noted that these clerks, although not enlisted or drafted, or regular or reserve officers, nevertheless possessed more than the usual indicia of civilian employees. It appears from the cases that they were appointed by the Secretary of the Army or Navy or the commander of the vessel on which they served, that they were paid by the Department of the Army or Navy, and that they even wore a uniform. One case specifically refers to them as officers. They appear, on the facts, to have been comparable to the present class of Department of the Army civilians, with the exception that they wore uniforms. In re Thomas, 13,888, 23 Fed. Cas. 931 (DC,

Miss., 1869); *United States v. Bogart*, = 14,616, 24 Fed. Cas. 4484 (DC, N.Y., 1869); *In re Bogart*, = 1,596, 3 Fed. Cas. 796 (CC, Calif., 1873); *In re Reed*, = 11,636, 20 Fed. Cas. 409 (CC, Mass., 1879).

Another series of cases arose out of Article 2(d) of the Articles of War of 1916, 39 Stat. 651, which subjected to military court martial jurisdiction,

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

In World War I and again in World War II, military court martial jurisdiction over civilians both in the United States and overseas was upheld under the terms of this article. e.g. *Hines v. Mikell*, 259 Fed. 28 (CCA 4th, 1919), cert. den. 250 U.S. 645 (civilian auditor in South Carolina); *Ex parte Gerlach*, 247 Fed. 616 (DC, N.Y., 1917) (civilian mate on an Army transport); *Ex parte Falls*, 251 Fed. 415 (DC, N.J., 1918) (civilian cook on an army transport in New York harbor); *Ex parte Joehen*, 257 Fed. 200 (DC, Texas, 1919) (civilian superintendent of Quartermaster Corps with troops on the Mexican border); *Peristein v. United States*, 151 F. 2d 167 (CCA 3d, 1945), cert. granted, 327 U.S. 777, dismissed as moot, 328 U.S. 822 (assistant mechanical superintendant employed by private army contractor in Eritrea, Africa, in 1942); *in re DiBartolo*, 50 F. Supp. 929 (DC, N.Y., 1943) (mechanic with Douglas Aircraft Co. in Eritrea, Africa, in 1942); *McCune v. Kilpatrick*, 53 F. Supp. 80 (DC, Va., 1943) (cook on military vessel loading military supplies); *In re Berne*, 54 F. Supp. 252 (DC, Ohio, 1944) (merchant seaman on convoy vessel).

In *Grewe v. France*, 75 F. Supp. 433 (DC, Wis., 1948), the defendant had been a mechanical engineer with the Office of the Chief Engineer, U.S. Forces, European Theater, in Frankfurt, Germany, in 1946. The Court held that Article 2(d) was constitutional and that, since Germany was still

a military occupied zone and in a state of war, though hostilities had ceased, there was jurisdiction under either section of Article 2(d). This is a borderline case, but probably should be considered as one of the wartime cases. See also, *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (CCA 5th, 1949), cert. den. 338 U.S. 904, reh. den. 338 U.S. 904, reh. den. 338 U.S. 945 (civilian post exchange employee arrested in the United States to be returned to Germany for court martial).

On the other hand, a few cases have refused court martial jurisdiction when it was clear that the person attempted to be court martialed was a civilian with no relationship to the armed forces. The first of these cases was *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866) where a civilian was arrested in Indiana and tried by a military commission for offenses against the United States committed during wartime. The Court held that there was no jurisdiction on the ground that military tribunals could not constitutionally be substituted for civil courts that were open and operating in the proper and unobstructed exercise of their jurisdiction. It should be noted that the petitioner in this case had no relationship to the military in any way.

Again, in *Ex parte Henderson*, 6349, 11 Fed. Cas. 1067 (C.C. Ky., 1879) the Court struck down as unconstitutional a statute that attempted to confer court martial jurisdiction over a civilian contractor who furnished supplies to the army in the United States.

In only one of the group of World War I cases was military jurisdiction not upheld. In *Ex parte Weitz*, 256 Fed. 58 (DC, Mass., 1919), the defendant was a civilian chauffeur for a contractor doing construction work for the military in Massachusetts, and the Court held that his work had no "direct relation to the transport, maintenance, or supply of an army in the field," although adding that if he had been so employed and within the terms of Article 2(d) of the Articles of War, he would have been subject to court martial jurisdiction. There appears to be nothing inconsistent between this case and the cases cited above for the general proposition.

Finally, in *Dungan v. Kahanamoku*, 327 U.S. 304 (1946), the Court refused to sustain military jurisdiction over a

civilian shipfitter employed by the Navy Yard in Honolulu and over a civilian stockbroker in Honolulu who had no connection with the armed forces.

Under Article 2(11) of the Uniform Code of Military Justice, jurisdiction over civilian employees in peacetime has been directly considered in only four reported opinions, and the first of these was prior to *Reid v. Covert*, *supra*. In the first of these cases, *In re Varney's Petition*, 141 F. Supp. 190 (DC, Calif., 1956), Varney, a Department of the Army civilian in Japan who had been convicted by a general court martial, was denied relief by habeas corpus on four grounds, (1) He had not exhausted all remedies available to him in the military appellate court system. (2) He was within the express terms of Article 2(11) and therefore in a status which did not entitle him to a jury trial. (3) While voluntarily in a foreign country with the Army, he had no right to a trial by jury, on the authority of *In re Ross* (consular court) and the *Insular Cases*. (4) Congress is empowered to authorize trial by court martial of civilians associated with the land and naval forces by virtue of their power under Article I, Section 8, Clause 14, as supplemented by the Necessary and Proper Clause. The Court then reasoned that it was necessary to have jurisdiction over civilians such as the petitioner.

In *Grisham v. Taylor*, 161 F. Supp. 112 (DC, Pa., 1958) (said to be on appeal to the 3rd Circuit and due to be argued soon), petitioner was a Department of the Army civilian assigned to the Corps of Engineers, and on temporary duty in France. He was tried by a general court martial for premeditated murder and found guilty of unpremeditated murder. The Court considered Judge Holtzhoff's opinion in *Guagliardo v. McElroy*, *infra*, the *Toth* case, *infra*, and *Reid v. Covert*, *supra*, concluding with the following holding:

"In the light of the divergent opinions in *Covert* and the self-defeating alternatives, enumerated and evaluated by Mr. Justice Harlan in *Covert* (Note 12, Page 76), I conclude, paraphrasing Mr. Justice Black, *Covert supra*, that this is a circumstance where petitioner was in the armed services for purposes of Clause

14 even though he had not been formally inducted into the military and did not wear a uniform."

The Court added to this that Article 2(11) was constitutional and that civilian employees abroad attached to the armed forces could be subjected to trial by court martial, even in capital cases.

In *United States ex rel. Guagliardo v. McElroy*, 66 158 F. Supp. 171 (DC, D.C., 1958), the petitioner was an electrical lineman employed by the Department of the Air Force in Morocco. He was tried and convicted by a general court martial for a non-capital offense. In an excellent summary of the existing state of the Supreme Court's decisions, Judge Holtzhoff summarized the holdings as follows:

"A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a serviceman is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country is subject to trial by court-martial."

The Court then considered the history of the various provisions in military codes that subjected civilian employees to court martial jurisdiction. However, in denying relief to the petitioner, the Court did so on the grounds,

"That a law subjecting personnel of the type involved in this case to trial by court martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny

this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States in foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties that in some instances might prove insuperable."

This decision was reversed by the Court of Appeals for the District of Columbia in the fourth reported opinion on this question, on the ground that the clause "employed by" was not severable from the other clause struck down in 67 Reid v. Covert. Therefore, the Court considered itself bound by the decision in Reid v. Covert, and did not consider the issue of whether civilian employees could constitutionally be subjected to court martial jurisdiction. Judge Burger entered a strong dissent on the grounds that : (1) The majority result was not compelled by Reid v. Covert, because a civilian employee could be either "in" the armed forces in accord with the Black opinion, or that he could be within the Necessary and Proper Clause as suggested by the concurring opinions. (2) There is historic precedent for subjecting civilian employees to court martial jurisdiction whereas there is none for dependents. (3) Clear necessity exists for subjecting civilian employees to court martial jurisdiction. (4) No practical alternative exists. United States ex rel. Gugliardo v. McElroy, adv. sheet, Sept. 12, 1958 (DC App., 1958), reversing 158 F. Supp. 171 (petition for certiorari said to be pending before the United States Supreme Court). The logic of this dissent is appealing; it is well reasoned and most convincing and this Court is persuaded to adopt it.

There appears to be a clear distinction between those cases sustaining jurisdiction and those denying it. When the person involved was clearly a civilian with no material relationship to the armed forces, jurisdiction has consistently been denied to the armed forces. On the other hand, when the individual concerned has had a clear relationship to the armed forces, so that he may properly be said to be part of them, jurisdiction has been upheld in all cases

except the last one cited above, where the Court voiced no opinion on the point. The Supreme Court appears to have recognized this distinction. For example, Mr. Justice

Black, in *Duncan v. Kahanamoku*, *supra*, speaking for the Court, said at page 313,

"Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, *those directly connected with such forces*,⁷ or enemy belligerents, prisoners of war, or others charged with violating the laws of war." (emphasis added)

At Note 7, for the proposition underlined here, the Court cited *Ex parte Gerlach*, *supra*, *Ex parte Falls*, *supra*, *Ex parte Jochen*, *supra*, and *Hines v. Mikell*, *supra*.

Again, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, (1955), Justice Black, in the majority opinion to which five other justices subscribed, said, at page 15,

"For given its natural meaning the power granted Congress 'To make Rules' to regulate 'the land and naval forces' would seem to restrict court-martial jurisdiction to persons who are actually members *in part* of the armed forces." (emphasis added)

Finally, in the Black opinion in *Reid v. Covert*, *supra*, the learned Justice said that,

"Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purpose of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

The Court then added, however, that dependants were not in this class of persons who could be considered a part of the armed services. Presuming that this language has some meaning, we think it at least recognizes a distinction between those who accompany our armed forces overseas for purposes of convenience only, such as dependants, and those who are so closely aligned with the necessary functioning of our armed forces overseas that they may logically be said to be a part of those forces. This distinc-

tion, based on the relationship of the person concerned to the armed forces, runs through all the cases cited above, and we think it a valid one. Consequently, it is the opinion of this Court that petitioner here was in the armed services for purposes of jurisdiction under Article I, Section 8, Clause 14, of the Constitution.

However, even if it should be considered that the petitioner does not fall within the express terms of Clause 14 for purposes of jurisdiction, this Court is of the opinion that the result arrived at in this case is equally sustainable on other grounds. The parties here are also at issue on the question of whether jurisdiction over a civilian employee overseas can be sustained by virtue of the necessary and proper clause of the Constitution, irrespective of whether that same person is within the terms of Clause 14. This, of course, resolves itself to the issue of whether the necessary and proper clause modifies or extends Clause 14.

First, it should be noted that the Supreme Court in *Reid v. Covert* was equally divided on this question. The four justices in the Black opinion agreed that

“... the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—‘the land and naval Forces.’”

On the other hand, Justice Frankfurter expressed the opinion that the Necessary and Proper Clause was an integral part of Clause 14, and that Congress could therefore sweep in whatever was necessary to make effective the express power of Clause 14. Justice Harlan also disagreed with the Black opinion on this point, and agreed with Justice Frankfurter that the Necessary and Proper Clause was to be taken with Clause 14 and could be used to expand it. The dissent also assumed this to be true, and devoted itself almost entirely to a consideration of whether Article 2(11) was reasonably necessary to the power given Congress by Clause 14.

This Court is disposed to follow the view that the Necessary and Proper Clause does give Congress power to enact whatever legislation is necessary for the effective government and regulation of our armed forces. This view has been adopted by the other courts that have

considered the question, and it has previously been assumed to be settled law that the Necessary and Proper Clause, as stated by Justice Harlan in *Reid v. Covert*, "is to be read with *all* the powers of Congress." See e.g. *United States ex rel. Guagliardo v. McElroy*, *supra*, at page 178; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819).

The final issue for determination then is whether jurisdiction over civilian employees of the armed forces overseas is necessary for the government and regulation of those armed forces.

Since World War II the troubled international situation has made it necessary for the United States to deploy its armed forces throughout the World, and not infrequently in remote and isolated areas. These forces include a large number of civilian employees, many of whom are technicians and specialists in the fields of electronics, rocketry, atomic energy, aircraft and aircraft weapons. Their relationship to the effective functioning of our armed forces is well known. It is seriously doubted if many of these civilian employees could be replaced by uniformed soldiers, sailors or airmen capable of carrying out the assigned tasks.

In many instances these civilians may very well possess some of this nation's highest and most guarded secrets which are necessary to their employment and to the defense of the free world. Obviously, the military commander must have means to insure control of civilian employees not only for the most effective utilization of their skill, but also to insure the proper utilization and protection of highly classified security information they may possess.

71 The military commander has the primary responsibility of maintaining armed forces in a state of combat readiness to meet any eventuality. He has the further responsibility of operating his military community in such a way as to give the best possible impression of the United States to the people in foreign areas. To discharge these responsibilities the commander must have some control over the activities of his charges both uniformed and non-uniformed. These civilian employees usually enjoy the privileges and benefits received by the military; and nearly every essential of their daily living and activities is interwoven with those of the military. Considered realistically, these civilian employees are a part of our

armed forces overseas. The question here is not simply whether military or Article III civil courts should have jurisdiction. In many cases, if not in all cases, the realities of the situation reduce it to a question of whether anyone should have jurisdiction. A variety of alternatives to military jurisdiction have been proposed and fully considered. See e.g. Note 12 on page 76 of Justice Harlan's opinion in *Reid v. Covert*; 74 *Harvard Law Review* 712. None have been found or even proposed that are wholly satisfactory and serious doubt exists that any of them would work at all. Even if certain alternative solutions were available in certain situations, such as trial in a civil court, these solutions would seriously diminish a local commander's effectiveness in maintaining law and order on his post, and could even greatly lessen the security of the post itself. Without the power of disciplinary action over these civilians the commander's efforts to successfully fulfill his mission in a foreign land would be seriously impaired.

72 Certainly it cannot be said that these considerations are irrelevant in determining whether jurisdiction over civilian employees overseas is necessary to the effective government and regulation of our armed forces. Therefore, it is the conclusion of this Court that Congress may, under the authority of the Necessary and Proper Clause, provide for court-martial jurisdiction in non-capital cases over others than uniformed members of our armed forces when necessary for the effective government and regulation of those armed forces. It is also the conclusion of this Court that court martial jurisdiction in non-capital cases over civilian employees of the armed forces in foreign lands is necessary for the effective government and regulation of our armed forces.

The Order to show cause is discharged and the petition is dismissed.

Dated at Denver, Colorado, this 13th day of November, A. D. 1958.

By the Court:

ALFRED A. ABRAM

Alfred A. Arraj

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 6161

(File Endorsement Omitted)

Notice of Appeal—Filed Dec. 2, 1958

Notice is hereby given that Bruce Wilson, the petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Memorandum Opinion and Order entered in this action on November 10, 1958.

Major General John F. Bohlander, Commander, Fitzsimons Army Hospital, Denver, Colorado, is designated as the appellee.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH JUDICIAL CIRCUIT

Sitting at Denver, Colorado

Twenty-Second Day, November Term, Tuesday,
December 23rd 1958

PRESENT: Honorable Jean S. Breitenstein, Circuit Judge,
And other officers as noted on the 17th day of November, 1958.

Before HONORABLE SAM G. BRATTON, *Chief Judge*.

BRUCE WILSON, *Appellant*,

6063

vs.

MAJOR GENERAL JOHN F. BOHLANDER, Commander,
Fitzsimmons Army Hospital, *Appellee*.

Appeal from the United States District Court
for the District of Colorado

This cause came on to be heard on the application of appellant for leave to docket the cause as a poor person; that a copy of the certified transcript of the record from the United States District Court be certified to the Supreme Court of the United States, together with petitioner's exhibit 1, duly certified; and that further action here in be held in abeyance.

On consideration whereof, and for good cause shown, it is ordered that said application be granted and the same is hereby granted and that appellant may docket the cause instantaneously without being required to prepay fees or costs or to give security therefor.

It is further ordered that the clerk of this court transmit to the Supreme Court of the United States a certified copy of the record from the United States District Court for the District of Colorado, together with petitioner's exhibit 1, duly certified; and that further action by this court be held in abeyance.

It is further ordered that the clerk of this court forthwith transmit to the clerk of the Supreme Court of the United States a certified copy of this order.

A true copy as of record,

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, do hereby certify the foregoing as a full, true and complete copy of the transcript of record from the United States District Court for the District of Colorado had and filed in the United States Court of Appeals for the Tenth Circuit, in a certain cause, No. 6063, wherein Bruce Wilson is appellant, and Major General John F. Bohlander, Commander Fitzsimmons Army Hospital, is appellee, as full, true and complete as the original transcript of record remains on file in my office.

I do further certify that no action has been taken in said cause by the United States Court of Appeals for the Tenth Circuit, other than the entry of an order docketing the cause in forma pauperis.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 23rd day of December, A. D. 1958:

ROBERT B. CARTWRIGHT,
*Clerk of the United States
Court of Appeals, Tenth
Circuit.*

By GEORGE A. PEASE
Chief Deputy Clerk.

**Order Granting Motion for Leave to Proceed In Forma
Pauperis and Petition for Certiorari—Feb: 24, 1959**

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 725, placed on the summary

calendar and assigned for argument immediately following No. 571.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 24, 1959